SUBJECT INDEX.

PETITION FOR WRIT OF CERTIORARI.

PAGE

Jurisdiction 1

The Questions Presented 2

Statutes Involved 3

Statement of the Case 4

Statement of Points Relied Upon in Appeal to the Circuit Court of Appeals 9

Reasons Submitted for Allowance of this Petition 10

Prayer for Writ 10

BRIEF IN SUPPORT OF PETITION.

Arguments and Authorities 12

Point I. The Course of Reasoning and Decision Rendered by the Circuit Court of Appeals in the Case at Bar as it Relates to the Admissibility of Hearsay Evidence as to the Alleged Statements Made by the Driver, Glogowski, a Week to Ten Days After the Accident Against the Corporate Defendant's Objections is Contrary to and in Conflict with the Decisions of This Honorable Court and of the Supreme Judicial Court of the Commonwealth of Massachusetts 12

Point II. Without the Testimony of the Alleged Statements of Glogowski Made in the Hospital Ten Days After the Accident the Plaintiff Failed to Establish His Burden of Proving That at the Time of the Accident the Truck of the Corporate Defendant was Being Operated in the Course of the Business of the Corporate Defendant 28

Conclusion 30

INDEX OF CASES AND AUTHORITIES CITED.

PAGE

Baker v. Gerrish, 14 Allen 201 17
B. & M. R. R. Co. v. Ordway, 140 Mass. 510, 512 .....2, 24
Boston Food Products Co. v. Wilson & Co., 245 Mass. 550, 561 ..... 2, 24
Brady v. Doherty, 253 Mass. 518, 522 20
Brigham v. Peters, 1 Gray 139 17
Conklin v. Consolidated Railway Co., 196 Mass. 302, 305 22
Du Bois v. Powdrell, 271 Mass. 394, 397 .....2, 16
Elmer v. Fessenden, 151 Mass. 359 25
Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 Lawyers Ed. 1188 12
Erie R.R. Co. v. Tompkins, 304 U.S. 68 26
Fleischner v. Durgin, 207 Mass. 435, 436 .....2, 29
Garford Trucking Corp. et al. v. Joseph Mann, Fed. (2) 1, 10
Hartnett v. Gryzmish, 218 Mass. 258 .....2, 29
Jackson v. Colonial Provision Co., Inc., 314 Mass. 177, 179 17
La Abra Silver Mining Co. v. United States, 175 U.S. 423, 499 .....2, 26
Lawlor v. Lowe, 235 U.S. 522, 526 26
Morrison v. Tremont Trust Co., 252 Mass. 383 2
Partridge v. United Elastic Corp., 288 Mass. 138 26
Rankin v. Brockton Public Market, 257 Mass. 6 2
Robinson v. Old Colony St. Ry., 189 Mass. 594 2
Stollenwerck v. Thacher, 115 Mass. 224 17
Stone v. Commonwealth Coal Co., 259 Mass. 360 29
Sylvester v. N. Y., N. H. & H. R. R. Co., 217 Mass. 148 .....2, 17
Treasurer and Receiver General v. MacDale Warehouse Co., 262 Mass. 588 2
Vallavanti v. Armour & Co., 260 Mass. 417 29

Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U.S.C.A. 347 1
Act of Feb. 13, 1925, Sec. 8, 28 U.S.C.A. 350 1

In the

Supreme Court of the United States.

OCTOBER TERM, 1947.

No.

GARFORD TRUCKING CORPORATION ET AL.,
DEFENDANTS-APPELLANTS-PETITIONERS,

v.

JOSEPH MANN,
PLAINTIFF-APPELLEE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

The petitioners, Garford Trucking Corporation and J. Albert Glogowski, respectfully request that a Writ of Certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of *Garford Trucking Corporation et al.* v. *Joseph Mann*, Fed. (2) (not yet reported) rendered on July 24, 1947, which affirmed the judgment of the District Court entered on November 5, 1946.

JURISDICTION.

Jurisdiction of this court is invoked under the Act of February 13, 1925, Chapter 229, Sections 1 to 43, Statutes 938, U.S. Code, Title 28, Section 347.

This petition was filed within the three months from July 24, 1947, the date of the entry of the judgment of the Circuit Court of Appeals as required by Section 8 of the Act

of February 13, 1925, *supra* (U.S. Code, Title 28, Section 350).

Notice of this petition, together with a copy of the petition, printed record and supporting brief has been duly served by the petitioners upon counsel for the respondent and due proofs of such service filed with the Clerk, as required by Rule 38 of this Court.

THE QUESTIONS PRESENTED.

The questions presented involve the correct interpretation of the law of the Commonwealth of Massachusetts as to the responsibility of the principal for the unauthorized negligence of his employee and as to the correctness of the decision of the District Judge in permitting hearsay testimony as to the alleged statements of an agent purporting to establish his state of mind and purpose so as to charge his principal with responsibility for such unauthorized acts of the employee.

The questions are important to the appellants as they involve judgments of $29,000 and are in conflict with the settled law of the Commonwealth of Massachusetts as established by such cases as *Fleischner* v. *Durgin,* 207 Mass. 435; *Sylvester* v. *N. Y. N. H. & H. R. R. Co.,* 217 Mass. 148; *Du Bois* v. *Powdrell,* 271 Mass. 394; *Treasurer and Receiver General* v. *MacDale Warehouse Co.,* 262 Mass. 588; *Morrison* v. *Tremont Trust Co.,* 252 Mass. 383; *Hartnett* v. *Gryzmish,* 218 Mass. 258; *Boston Food Products Co.* v. *Wilson & Co.,* 245 Mass. 550; *B. & M. R. R. Co.* v. *Orduay,* 140 Mass. 510; *Rankin* v. *Brockton Public Market,* 257 Mass. 6; *Robinson* v. *Old Colony St. Ry.,* 189 Mass. 594.

The decision of the District Court and of the Circuit Court of Appeals is also in conflict with the established law and with the decision in *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423, 499.

The judgment of the District Court and the decision of the Circuit Court of Appeals destroys the well established

principle of law which makes inadmissible hearsay evidence and controverts the decisions of the courts of the Commonwealth of Massachusetts and of the United States Supreme Court which have held repeatedly that alleged statements of an agent made not as a part of the *res gestae* but at a time distant from the happening of the accident and not in the presence of the principal or any authorized representative of the principal are not binding on the principal.

The judgment of the District Court and the decision of the Circuit Court of Appeals removes from the plaintiff the burden of establishing by a fair preponderance of admissible evidence that the relationship of principal and agent existed at the time of the happening of an accident.

Two principal questions presented are: First, that the District Court erred in permitting the jury to consider the hearsay testimony as to statements alleged to have been made by the servant, Glogowski, some two weeks after the accident in the presence of the plaintiff but not in the presence of the corporate defendant or any authorized representative thereof, as to the purpose of Glogowski in operating his automobile upon the route in which he was operating the automobile of the corporate defendant at the time of the alleged accident. Second, that without the hearsay testimony referred to above, there was no evidence on which the jury would have been warranted in finding that at the time of the alleged accident the motor vehicle of the corporate defendant was being operated by its servant on and in the course of the business of the corporate defendant and there being no such evidence other than this hearsay testimony, the action against the corporate defendant should have been dismissed.

STATUTES INVOLVED.

The construction of no statute is involved in the questions here presented.

STATEMENT OF THE CASE.

On May 9, 1945, the defendant, Garford Trucking Corporation, was an interstate carrier of property by motor vehicles and the defendant, Glogowski, was in the general employ of the defendant, Garford Trucking Corporation as a chauffeur and operator of such motor vehicle.

The defendant, Garford's, place of business was at South River, New Jersey. It had a branch office at Plainville, Massachusetts, in charge of one McCarthy, as manager (R., pp. 233, 244). On the morning of May 9, 1945, the defendant, Glogowski, who had arrived from New Jersey on the previous afternoon with a tractor and trailer, was instructed by the manager, McCarthy, at Plainville, to take his tractor and an empty trailer to the Draper Warehouse in Framingham where he was to leave the empty trailer and take on a loaded trailer and proceed from there to the Worcester Turnpike known as Route 9, along the Worcester Turnpike to Route 20 and from there on in the most direct route to the main office of the defendant, Garford, South River, New Jersey.

The unit operated by the defendant, Glogowski, consisted of a motor tractor, so-called, on which was the cab occupied by the driver and the motive power of the unit to which was attached a box or trailer by a pin passing through what was called a fifth wheel on the rear portion of the tractor.

The defendant, Glogowski, proceeded to the Draper Warehouse in Framingham and there was attached to his tractor a trailer loaded with bales of wool. From the Draper Warehouse the defendant, Glogowski, proceeded with his tractor and trailer unit until he reached the route known as 126 which intersects and crosses the Worcester Turnpike known as Route 9 in the southerly portion of Framingham.

Route 126 crosses Route 9 on the overpass and to reach Route 9 to proceed in the direction toward Worcester ve-

hicles make a left-hand turn after crossing on the overpass into the main traveled way of Route 9.

The defendant, Glogowski, on crossing Route 9 on the overpass, was signaled by a sailor, stopped his vehicle and picked up the sailor who was trying to reach his home in Saxonville on Route 126.

The defendant, Glogowski, was familiar with the rule of the defendant, Garford, prohibiting the carrying of riders upon motor vehicles and knew that the picking up of the sailor was a violation of that rule (R., p. 218).

In order to take the sailor to his home it was necessary for the defendant, Glogowski, to travel on Route 126 or Concord St., so named, instead of turning left on the Worcester Turnpike or Route 9. Route 126 ran in a northerly direction away from the Turnpike and in the opposite direction from which the defendant, Glogowski, would have traveled had he taken the Worcester Turnpike as directed by McCarthy.

The defendant, Glogowski, had proceeded some distance on Route 126 with the sailor in the cab with him when the collision occurred between the plaintiff's vehicle traveling in a southerly direction on Concord St. and the defendant's vehicle traveling in a northerly direction.

Testimony as to the happening of the accident was conflicting. On the testimony offered by the plaintiff the jury would have been warranted in concluding that the defendant, Glogowski, just prior to the accident was operating his vehicle at a rate of speed in excess of 35 miles an hour (a direct violation of the wartime speed limit prescribed by the Office of Defense Transportation) and was traveling to the left of the middle of the way.

The evidence of the defendant, Glogowski, would have warranted a finding that the plaintiff was traveling to the left of the middle of the way and the accident occurred as the result of the belated attempts of the plaintiff to drive his vehicle to the right of the middle of the way.

The collision substantially demolished the plaintiff's automobile, caused serious injuries to the plaintiff and more or less serious injuries to the defendant, Glogowski, the overturning of the tractor-trailer unit and the throwing about of the bales of wool on the road and adjoining ways, the breaking off of a telephone and light pole and other damage described in the record.

There was evidence from certain police officers called by the plaintiff that Route 126 on which the defendant, Glogowski, was traveling in a northerly direction, ultimately intersected Route 20 in the town of Wayland and that one could then proceed on Route 20 to the point where it intersects Route 9; that the distance from the Worcester Turnpike by way of Route 126 and Route 20 to where Route 20 intersects the Worcester Turnpike was 28 to 30 miles, while the distance from the intersection of Route 126 and the Worcester Turnpike to the intersection of Route 20 and the Worcester Turnpike on the Turnpike itself was 15 miles (R., p. 64).

There was testimony from the same police officers that Route 9, known as the Worcester Turnpike, was a wide through-way route with room for three vehicles traveling abreast on each way, one traveling south toward Worcester and the other traveling north toward Boston; that the route was paved with concrete and was used extensively by motor vehicles; that Route 126 was a narrow way less traveled, black macadam surface; that there were high hills on the route particularly one going through the town of Marlborough.

Evidence was offered by the plaintiff that at the Framingham Hospital where both the plaintiff and the defendant, Glogowski, were removed for treatment following the accident and some week or ten days after the accident, a conversation took place between the defendant, Glogowski and one Davis, also a patient at the hospital and the room-mate of the plaintiff in which the following occurred:

"*Q.* Was there any further talk to refresh your mind about this road on which he was traveling? *A.* He told me, I asked him where he came from, he said he came from Plainville and went to the Draper Woolen Shop and picked up his trailer there and I asked him where he was going and he said New Jersey so I asked him—do you want me to say the word?

Q. Well— *A.* What the hell were you going that way for? He said, 'I go that way because I can make better time,' and I said, 'Why didn't you take the Turnpike?' He said, 'I go that way to make better time (R., p. 127).'"

There was also testimony from the plaintiff, Mann, with reference to an alleged conversation between Mr. Davis and the defendant, Glogowski, as follows:

"*Q.* What do you mean by he? *A.* This man Red (Davis) asked Glogowski in the course of the conversation what he was doing on that other road and he said, 'You told me you were going to Worcester.'

Q. Who said this? *A.* This Red said to Glogowski, 'You told me before you were going to Worcester. Why did you go across there?' So Glogowski said to Red, 'O I usually take this road, I hit No. 20 over there and, O boy, then you can open it up zoom.' That is the way he described it (R., p. 93)."

Upon the objection of the defendant both of these alleged conversations were restricted by the court to apply only against the defendant, Glogowski and not against the defendant, Garford.

Although the judge charged the jury at the time of the offering of this evidence that they could consider it only against the defendant, Glogowski, in his charge the judge reversed his previous ruling and instructed the jury that

the evidence might be considered by them against the defendant, Garford, in the following language:

"Now with respect to his purpose in taking this route there is some evidence here that you will take into consideration as to his purpose when he was going along Concord Ave. Was his purpose to perform his master's business, his employer's business, was that his purpose? This evidence deals, Mr. Foreman, with evidence introduced here through the plaintiff and a witness by the name of Red. Evidence came into this case that Glogowski, when he was in the hospital, in substance, the sequence is not correct but this is the substance of his conversation, is the talk that Glogowski had with Red at the time he was in the hospital. 'You told me you were going to Worcester; what were you doing on the other road?' 'I usually take that road; I take No. 20 over there and then you can open up and go zoom.' That in substance was the conversation and then Red, I forget his last name, (Mr. Monahan. Davis. The Court. Davis) he testified in substance with respect to this matter, I am now talking to you about what Glogowski said he was going to New Jersey and the question was, 'What do you go that way for' and the answer was, 'I can make better time.'

"Now you can take that evidence into consideration as evidence of Glogowski's state of mind at the time he traveled over Concord Ave. and you can take into consideration in deciding the question, determining the question as to what his purpose was. Was his purpose to perform his master's business in going over Concord Ave. in that connection? You can determine that evidence because that is evidence of his state of mind and I charge you it is competent for you to consider in connection with this important factor that I point out to

you in determining whether or not he was working within the scope of his employment, whether when he went along Concord Ave. as he did at the time of the accident, he was performing his master's business or was intending to perform his master's business." (R., p. 260)

To this portion of the charge the defendant, Garford, took exception. Others of the defendant's objections to the judge's charges are noted on R., pp. 267–270.

STATEMENT OF POINTS RELIED UPON IN APPEAL TO THE CIRCUIT COURT OF APPEALS.

I. The District Court erred in denying the defendant, Garford Trucking Corporation, motion for directed verdict.

II. The District Court erred in refusing to admit in evidence the testimony offered by the defendants and noted by exceptions in the portions of the transcript of the evidence reported.

III. The District Court erred in admitting testimony objected to by the defendants as set out in the record.

IV. The District Court erred in permitting the argument of the plaintiff's attorney to which objection was made by the defendant's as set out in the record.

V. The District Court erred in those portions of his charge to the jury to which objection was made by the defendants as set out in the record.

VI. The District Court erred in permitting the case to go to the jury against the defendant, Garford Trucking Corporation, inasmuch as there was no evidence that the truck was being operated on the business of the Garford Trucking Corporation by the agent of the Garford Trucking Corporation at the time of the alleged accident.

REASONS SUBMITTED FOR ALLOWANCE OF THIS PETITION.

The amount of the judgment ($29,000) entitles the defendants to careful consideration of the questions involved.

The judgment of the District Court and the opinion of the Circuit Court of Appeals, if undisturbed, is contrary to the carefully considered decisions of the courts of the Commonwealth of Massachusetts and of the United States Supreme Court.

The judgment of the District Court and the opinion of the Circuit Court of Appeals, if affirmed, will so materially change the existing law as to the admissibility of hearsay evidence as to adversely affect the rights of all parties defendants where hearsay evidence hereto inadmissible will become admissible.

On this aspect of the case the question is of such importance as to warrant review by the highest court of the United States.

PRAYER FOR WRIT.

Wherefore, your petitioners, by their undersigned counsel, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit demanding that court to send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and also pleadings in the case entitled *Garford Trucking Corporation, et al.*, Defendants, Appellants, v. *Joseph Mann*, Plaintiff, Appellee, being designated and numbered on its Docket October Term 1946, No. 4244 and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court to the end that your petitioners may have the relief therein prayed for and such other and further

relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

GARFORD TRUCKING CORPORATION,
J. ALBERT GLOGOWSKI,
by their Attorneys,
HERBERT S. AVERY,
MICHAEL T. PRENDERGAST,
112 Water St., Boston, Mass.

CERTIFICATE.

I hereby certify that Michael T. Prendergast of Boston and I are counsel for the petitioners herein, Garford Trucking Corporation and J. Albert Glogowski; that in accordance with the request of said petitioners the within petition has been presented; that the allegations contained in said petition are true, to the best of my knowledge and belief and that the said petition is, in my opinion, well founded in law and in fact and should be granted.

HERBERT S. AVERY.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss., Boston, September 5, 1947.

Then personally appeared Herbert S. Avery of Boston, Masachusetts, and made oath that he caused the foregoing petition to be prepared and signed the same and that same is prepared with the consent of and in accordance with the request of the petitioners named therein and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

ELI FLEISHMAN,
[SEAL] *Notary Public.*

My commission expires August 13, 1954.

BRIEF IN SUPPORT OF PETITION.

In support of the allowance of the petition the following is respectfully submitted:

ARGUMENTS AND AUTHORITIES.

I.

THE COURSE OF REASONING AND DECISION RENDERED BY THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR AS IT RELATES TO THE ADMISSIBILITY OF HEARSAY EVIDENCE AS TO THE ALLEGED STATEMENTS MADE BY THE DRIVER, GLOGOWSKI, A WEEK TO TEN DAYS AFTER THE ACCIDENT AGAINST THE CORPORATE DEFENDANT'S OBJECTIONS IS CONTRARY TO AND IN CONFLICT WITH THE DECISIONS OF THIS HONORABLE COURT AND OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

In his action against the corporate defendant, Garford Trucking Corporation, a vital issue on which the plaintiff had the burden of proof was the question whether or not at the time of the happening of the accident the truck and trailer of the Garford Trucking Corporation was being operated by its servant in the course of his duty and employment for the corporate defendant.

It is well settled that the law governing the right to recover in this action is the law of the state where the accident occurred and that although the action may be tried in the United States District Court, the court must apply the law of the Commonwealth of Massachusetts in which the occurrence took place.

> *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 82 Lawyers Ed. 1188.

The trial court unquestionably recognized this and undertook to govern the trial accordingly.

An important issue affecting the interest and rights of

the appellant, Garford Trucking Corporation, is: Was the defendant, Glogowski, acting within the scope of his employment as an agent of the defendant, Garford, at the time of the happening of the accident?

The defendant, Garford, says that Glogowski was not acting within the scope of his employment at the time of the accident; that he had abandoned for the time being the business of the defendant, Garford, on which he was supposed to be engaged; that he had departed from the route over which he should have traveled and that he was engaged upon the project in transporting a sailor to his home in violation of the direct instructions of the defendant, Garford and that the plaintiff, Mann, failed in his burden of proving that Glogowski was acting within the scope of his employment at the time of the accident and is not entitled to recover against the defendant, Garford.

The accident occurred on May 9, 1945. This country was engaged in the prosecution of the greatest war of history. Our whole domestic economy was subjected to most stringent regulations and restrictions, all designed to more effectively prosecute that war.

Coincidentally V.E. Day and the surrender of Germany had been announced on that very day but with the announcement came also the admonition of the President that we must still prosecute diligently the war against Japan.

The motor carrier transportation in which the defendants were then engaged was subject to strict regulations by the Office of Defense Transportation. General orders and regulations issued by the Office of Defense Transportation had the force and effect of law and were binding upon both defendants. Section 501-6-(b)2 of said General Order issued by the Office of Defense Transportion contains the following:

> "No common carrier shall accept or receive any property for transportation over any circuitous route

except when no adequate common carrier service over a direct route is available or except when the direct route is unsafe or unusable or is more destructive to tires or motor trucks."

Section 501-126 prescribed as follows:

"Limitation on Speed. No person shall drive or operate or cause, permit, suffer or allow to be driven or operated any motor vehicle within the continental limits of the United States at a rate of speed which is (1) in excess of the applicable speed limits duly prescribed by competent public authority or (2) in excess of 35 miles per hour, whichever rate of speed is the lesser."

The two foregoing regulations were in full force and effect, were not repealed until after V.J. Day in August, 1945 and were binding alike on the defendant, Garford and the defendant, Glogowski.

The defendant, Glogowski, was an experienced driver, had been employed by the defendant, Garford, for a considerable period before the accident and the defendant, Garford, had a right to rely upon his obedience to the emergency regulations of the wartime restrictions and in the absence of any express instructions, the defendant, Garford, had a right to expect that Glogowski, in the performance of his duties would travel the most direct route which would have been Route 126 to Route 9 and from Route 9 to Route 20; that he would not take in the performance of his duties, the longer route, 126 to Route 20, thereby traveling nearly twice as far as he would have traveled if he had taken Route 9 to Route 20. But the evidence of the defendant, Garford, goes further and establishes the fact that Glogowski was given explicit instructions as to the route which was the shortest route and that he should travel to Route 9 and by Route 9 to Route 20.

It is, therefore, clear that Glogowski, when he departed from Route 9 and headed north along Route 126, had departed from his employment with the defendant, Garford, not only by a direct violation of the law which required him to travel by Route 9, but by direct violation of the instructions of the defendant's manager. It is also clear that the defendant, Glogowski, intentionally departed from the obligation which he owed to his employer, Garford, when he took on for transportation the sailor, Chasse, well knowing the rule of the defendant, Garford, that no riders were to be permitted on their vehicles.

If the plaintiff's evidence is to be believed as to the rate of speed at which the defendant, Glogowski, was driving his motor vehicle at the time of the accident, the plaintiff, by his evidence, has proved another ground on which the defendant, Glogowski, had departed from his duties to his employer in violation of the rate of speed limitations prescribed by the regulation of the Office of Defense Transportation.

It, therefore, follows that the plaintiff, by his evidence, has shown not that the defendant, Glogowski, was acting within the scope of his duties owed by him to his employer, but that he was acting outside of the duties imposed upon him toward his employer, first, in departing from the most direct route to his destination, second, in taking on a rider or passenger and third, in exceeding the speed limit imposed upon him by law.

Certainly under these circumstances it cannot be said that the plaintiff has sustained the burden of proof imposed upon him to establish that the defendant, Glogowski, was acting within the scope of his employment for the defendant, Garford, but rather, it must be held as a matter of law that the plaintiff has failed in meeting the burden of proof required of him.

You may search the record from first to last and you will find not one scintilla of evidence as to why the defendant,

Glogowski, should have been operating the motor vehicle on Route 126 or Concord St. traveling north away from the Worcester Turnpike in pursuance of any duty he owed to his employer, except the alleged declarations referred to in the judge's charge (R., p. 260. See also R., pp. 126, 127, 93).

These alleged statements of the defendant, Glogowski, were not any part of the *res gestae*. They were not made in the presence of any officer or representative of the defendant, Garford Trucking Corporation; they were made at a time more than a week after the accident; they could have no binding effect on the defendant, Garford and the judge was right in his original ruling excluding them from consideration in the Garford case.

In *Du Bois* v. *Powdrell,* 271 Mass. 394, 397, a witness was permitted to testify, *without objection,* that immediately after the accident the minor defendant, in reply to a charge that he was driving fast, stated: "My mother sent me to the telephone office to telephone to my father." With reference to this testimony, the court said:

> "This testimony was relevant to the issue of agency, tended to prove that the minor defendant was driving the automobile for his mother and was sufficient to carry the case to the jury. An alleged agent 'may be called as a witness and the agency may be shown by his testimony'—but in general his statements made out of court as to facts tending to show agency are inadmissible for that purpose because hearsay— Such statements are not competent as admissions by the principal binding upon him in the absence of independent evidence of the authority of the alleged agent to make them—and of evidence that they were brought home to the alleged principal— The testimony as to the statement of the minor defendant, however, *was admitted without objection or application for restric-*

tion of its use. No specific ruling on its competency was sought or made later and no question with respect thereto was raised by the motion for a directed verdict— Whether or not the testimony, if objection had been made, would have been admissible for any purpose in the circumstances of the case, it was entitled to its natural probative force as tending to show by a statement of the minor defendant but not by an admission on the part of his mother, that he was driving the automobile on an errand for her when the plaintiff was injured. No rule of substantive law precluded consideration of this testimony as in the case of parole evidence bearing a written instrument admitted without objection."

It will be seen from the foregoing that the *Du Bois* case is no authority for permitting the consideration of the evidence objected to on the question of agency because in the case at bar there was specific objection to the admission of the evidence and by order of the court the testimony was limited and made applicable only to the defendant, Glogowski.

In *Sylvester* v. *N.Y.N.H. & H.R.R. Co.*, 217 Mass. 148, 152, the court said:

> "The evidence of Jeffrey's statement does not appear to have been admitted as the declaration of the alleged agent to show the nature and extent of his authority. That would have been incompetent."
>
> *Brigham* v. *Peters*, 1 Gray 139; *Baker* v. *Gerrish*, 14 Allen 201; *Stollenwerck* v. *Thacher*, 115 Mass. 224.

In *Jackson* v. *Colonial Provision Co., Inc.*, 314 Mass. 177, 179, the court said:

> "The only evidence of authority is found in the testimony of Rabinowitz, he was asked, 'Did you conduct

negotiations which were conducted on behalf of the Colonial Provision Co. with regard to the property down on Ferry St.?' He answered, 'Yes.' It could be found that the negotiations included the hiring of the plaintiff. The defendant argues that the answer meant merely that Rabinowitz conducted negotiations, not that he concluded them with authority but the jury could take it that negotiations—conducted on behalf of the defendant meant negotiations conducted with its authority. This was *testimony,* not a declaration out of court (*Segal* v. *Allied Mutuals Liability Insurance Co.,* 285 Mass. 106, 109) and cases like *Du Bois* v. *Powdrell,* 271 Mass. 394, 397; *Treasurer and Receiver General* v. *MacDale Warehouse Co.,* 262 Mass. 588, 592, 593; *Morrison* v. *Tremont Trust Co.,* 252 Mass. 383, 388, have no application. It is true that the question would doubtless have been excluded upon objection as one calling for a conclusion of law upon unstated facts—but there was no objection and the testimony was admitted. It was as much evidence of the facts as though no objection lay to its admission— It constituted sufficient evidence of agency to take the case to the jury."

From the foregoing it is clear that the trial judge was correct in his original ruling when the alleged statements of Glogowski made in the hospital a week or ten days after the accident was offered through the testimony of the plaintiff and of the witness, Davis, against the objection of the defendant, Garford. At that time the trial judge ruled that the evidence was admissible only against the defendant, Glogowski and was not to be considered against the defendant, Garford.

It is also clear that the trial judge erred later in the course of his charge to the jury when he instructed the jury that they might consider the alleged statements of

Glogowski made in the hospital a week or ten days after the accident in the case against the defendant, Garford, in order to establish the state of mind or purpose of Glogowski in operating his vehicle at the point of the accident.

It cannot be questioned but what the testimony offered of the alleged statements of Glogowski in the hospital a week or ten days after the accident was hearsay testimony. It may well be conceded that if Glogowski had been on the witness stand and had testified to the facts in accordance with the alleged statements made by him in the hospital, that his testimony would have been admissible against the corporate defendant. That would have been testimony of a witness as to facts within his own knowledge.

It might well also be conceded that if Glogowski had been on the witness stand and had testified that he never made such statements as he was alleged to have made in the hospital, the testimony of the plaintiff and of the witness, Red, might then have become admissible against Glogowski for the purpose of discrediting the testimony of Glogowski.

Even then the testimony of the alleged statements of Glogowski in the hospital ten days after the accident would not have been evidence of the facts and could not have warranted a finding by the jury that that was the fact and that that was the purpose of Glogowski in operating his vehicle at the point of the accident. The most that the jury would be warranted in finding would have been that Glogowski's testimony was unreliable because he had made one statement on the witness stand and another statement at another time.

The trial judge appears to have been misled as to the meaning of the cases which have been cited as authority for permitting hearsay testimony as to statements made by a party on other occasions being admissible to show the state of mind of that party. All of these cases establish

clearly the proposition that as to the defendant, Glogowski, statements later made by him will be admissible under proper circumstances against him for the purpose of establishing his state of mind at the time of the accident. But it is clear that evidence which is admissible to show the state of mind is received not in order to establish the truth or falsity of the statements but merely to establish mental condition of the declarant at the time of making the statements.

The proposition is well stated by the court in *Brady* v. *Doherty*, 253 Mass. 518, 522. Starting on page 521.

> "The trial judge refused to allow her to testify to the truth or falsity of such statements and ruled in substance and effect that the declarations so made were not to be taken by the jury as evidence of the fact that the contestant sisters had tried unduly to influence him but only as tending to show his state of mind—whether it was a mind that was subject to undue influence. At common law the limitations placed upon the evidence by the trial judge was correct; it was in conformity with the rules stated in the leading case of *Shailer* v. *Bumstead*, 99 Mass. 112 and many later decisions of this court. In *Shailer* v. *Bumstead* it was said by the judge at pages 120, 122, 126, 'So it is universally uniformly held that the previous declarations of the testator offered to prove the mental facts involved are competent— Statements and declarations when the state of mind is the fact to be shown are, therefore, received as mental acts or conduct. The truth or falsity of the statements is of no consequence. As a narration it is not received as evidence of the facts stated. It is only to be used as showing what manner of man he is who makes it— It is difficult to say that declarations offered to establish mental facts of this description are of equal weight whether occur-

ring before or after the acts in question but if they are equally significant—they are equally competent and may be quite as influential with the jury— All this evidence under whatever view it is admitted is competent only and always to establish the influence and effect of the external act upon the testator himself, never to prove the actual fact of fraud or improper influence in another. *Hater* v. *Norton,* 188 Mass. 47, 52; *Aldrich* v. *Aldrich,* 215 Mass. 164; *Emery* v. *Emery,* 222 Mass. 439; *Neill* v. *Brackett,* 234 Mass. 367; N.C. 241 Mass. 531, 537. The limitation upon the testimony of the contestants respecting declarations and statements made by the testator was sufficiently favorable to her within the rules stated in *Shailer* v. *Bumstead Supra* and other cases where that rule has been subsequently applied."

It is obvious from the foregoing that the alleged statements of Glogowski in the hosptal, so far as they were admissible to show a state of mind, could be admissible only against him and if admitted for the purpose of showing state of mind, would be limited by the established rule for that purpose only and would have no weight as to the truth or falsity of the fact itself.

Quite another situation is presented when considering the admissibility of such testimony against the employer of Glogowski, the corporate defendant.

The court must not lose sight of the fact that when the testimony was originally offered upon objection of the corporate defendant it was carefully limited by the court and made applicable to Glogowski alone. In this there was no error and the appellee-plaintiff reserved no exception thereto. That ruling of the court became the law of the case for the conduct of the parties in connection therewith. The ruling of the court accorded correctly with the established law of the Commonwealth.

In *Conklin* v. *Consolidated Railway Co.*, 196 Mass. 302, 305, you will find the clear statement of the principle governing the case at bar. In that particular case the court says:

"The witness, Jacobs, was allowed against the exception of the defendant to testify that the defendant's conductor, Killoy, while on the defendant's car had said in a talk with the witness that he would have assaulted someone on the car before he got through. The plaintiff was not on this car and the time of the talk was no further fixed than by the witness' statement that it was a comparatively short time before the alleged assault on the plaintiff. It was agreed on both sides that there was an encounter between the conductor and the plaintiff but there was much contradictory evidence as to which of them was the aggressor. The jury were instructed to consider the testimony of Jacobs only upon the question whether the conductor did or did not begin the assault.

"The plaintiff's counsel contends that this evidence was competent on the general doctrine that upon the issue whether a person has done an act evidence of an intention or design in his mind to do that act is material and that his contemporaneous acts and declarations tending to show that he has such intentions are competent to show this fact. *Commonwealth* v. *Trefethen*, 157 Mass. 180; *Innis* v. *Boston, Revere Beach & Lynn R.R.*, 168 Mass. 433; *Viles* v. *Waltham*, 157 Mass. 542; *Commonwealth* v. *Crowley*, 165 Mass. 569.

"If this action were against the conductor himself the plaintiff's contention would be well founded. A defendant's intention or preparation to commit the particular wrong which it is charged he afterwards did commit, may always be shown in evidence against him. There are many decisions to this effect. *Commonwealth* v. *Williams*, 2 Cush. 584; *Commonwealth* v. *Choate*, 105

Mass. 451; *Commonwealth* v. *Chase,* 147 Mass. 597; *Commonwealth* v. *Quinn,* 150 Mass. 401; *Commonwealth* v. *Crowe,* 165 Mass. 139.

"Nor is it necessary that a threat of violence such as was here in question should be directed against a particular person upon whom the wrong was afterwards committed, if there was such a general threat or such an indication of the general malicious intent as could properly be found to have included that person within its scope—

"But in our opinion the question of the admissibility of this evidence must be determined upon the principle that the mere declaration of a servant or agent not within the scope of his employment or authority is admissible against his employer or principal *only when it constitutes a part of the res gestae,* when it either accompanies an act which is itself competent and material to be proved and which it tends to qualify, characterize or explain or when it is itself a part of the transaction under investigation. It is conceded that this is the general doctrine both of our own decisions and of those of other jurisdictions. We perceive no logical difference in the application of this principle between declarations made before and those made after the event in question and the very argument made here that such declarations even though not in themselves binding on the master, are yet competent to show the state of mind or the intention of the servant who made them, has been held to be unavailing— It is no more competent for a mere servant to make evidence against his employer by an antecedent statement or manifestation of his feeling than by any other admission he may be willing to make.

"We need not consider whether this evidence would

have been admissible if the declaration had been made while the plaintiff was on the car and with direct reference to him. Under the circumstances before us the question presented is almost exactly the converse of that which was considered in *Bonino* v. *Caledonia*, 144 Mass. 299, 402 and must be governed by the reasoning of that case. We are unable to avoid the conclusion that this evidence ought not to have been admitted and it undoubtedly must have been prejudicial to the defendant."

In *Boston Food Products Co.* v. *Wilson & Co.*, 245 Mass. 550, 561, the court said:

"There was evidence for the jury that Heyer was the defendant's general manager and authorized to make the contract in question but the admissions of the general manager which are not made in the performance of his duties as such general manager are not admissible against his principal. *Wellington* v. *B. & M.R.R.*, 158 Mass. 185; *Gilmore* v. *Mittineague Paper Co.*, 169 Mass. 471; *Brackett* v. *Commonwealth*, 223 Mass. 119, 127.

In *B. & M.R.R. Co.* v. *Ordway*, 140 Mass. 510, 512, the court said:

"Evidence that Flanders made certain admissions tending to establish the company's liability was not made competent by the fact that he was the company's freight agent without more. A freight agent cannot affect his principal by admissions merely as such. In the cases cited for the defendant in review the admissions were statements made when delivery of the goods was applied for—or when information was sought from the person designated by the general representative of the principal—or in some other similar way was raised from the rank of mere admissions to authorized acts

done on behalf of the principal in furtherance of the principal's legal duty. The admissions, too, were not mere admissions of liability but were specific facts which it was the agent's province to know— Here, even if we assume that deliverance admissions were specific facts, the goods had been delivered and opened before the conversation and there is nothing to show that the freight agent had any further duty to perform or if he had, that he was attempting to perform them."

The Circuit Court of Appeals, in its opinion in the case at bar, did not properly construe the effect of the cases cited by it on the issue now being discussed.

In *Elmer* v. *Fessenden*, 151 Mass. 359, cited by the Circuit Court of Appeals, it appears that the plaintiffs then, to prove the reason why they stopped work, asked the witness whether they gave any reason for stopping work. This question was excluded by the court. The plaintiff afterwards asked:

"*Q.* What, if anything, did they say as reason for stopping?"

This question the court also excluded.

As to this excluded testimony, the court, in its opinion at page 362, said as follows:

"As a rule such declarations are not evidence of the past facts which they may recite. The cases in which they have been admitted prove the cause of a wound or injury when the declarations were made at the time or immediately after the event, if not exceptions to the general rule, at least mark the limit of admissibility. *Commonwealth* v. *Hackett*, 2 Allen 136, 140; *Commonwealth* v. *McPike*, 3 Cush. 181, 184; *Insurance Company* v. *Mosley*, 8 Wall 397.

"The excluded testimony was not competent to prove

that the defendant did tell, a workman, the story. As to that it was mere hearsay and was not within the scope of the special reasons which led to the decisions last cited."

In *Partridge* v. *United Elastic Corp.*, 288 Mass. 138, cited by the United States Circuit Court of Appeals, evidence was admitted as to statements made by the intestate prior to the happening of the accident but this evidence was admitted under the special statute permitting the statements of deceased persons to be admitted and the case, therefore, has no application to the case at bar.

There is nothing in *Lawlor* v. *Lowe*, 235 U.S. 522, 526, cited in the opinion of the Circuit Court of Appeals, to support the court in suggesting in its opinion that a different rule as to admissibility of evidence of this character may apply under the Federal law than under the law of the Commonwealth of Massachusetts. This suggestion is contrary to the decision of this court in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 68 and contrary as well to the rule laid down by this court in the case of *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, where, at page 498, the court said:

"A kindred principal governs in regard to the declarations of agents. The principal constitutes the agent representative in the transaction of certain business; whatever, therefore, the agent does in the lawful prosecution of that business is the act of the principal whom he represents and where the acts of the agent will bind the principal there his representations, declarations and admissions respecting the subject matter will also bind him *if made at the same time and constituting part of the res gestae.* They are of the nature of original evidence and not of hearsay. The representation or statement of the agent in such cases being the ultimate fact to be proved and not an admission of some other fact, but it must be remembered that the admis-

sion of the agent cannot always be assimilated to the admission of the principal. The party's own admission, wherever made, may be given in evidence against him but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus.* It is because it is a verbal act and part of the *res gestae* that it is admissible at all and, therefore, it is not necessary to call the agent himself to prove it but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it and it follows that when his right to act in the particular manner in question has ceased, the principal can no longer be affected by his declarations, they being hearsay."

This latter statement just quoted establishes clearly the fact that the testimony as to the statements alleged to have been made by Glogowski in the case at bar a week or ten days after the accident while he was in the hospital as to his purpose in traveling on the route on which he was traveling at the time of the accident were clearly inadmissible against the defendant, Garford and the instruction of the trial court that the jury might consider them in determining the purpose for which the truck was being operated at the time of the accident was such error as to be prejudicial to the defendant, Garford and for this reason, if no other, the judgment of the District Court and the opinion and decision of the Circuit Court of Appeals must be reversed.

II.

WITHOUT THE TESTIMONY OF THE ALLEGED STATEMENTS OF GLOGOWSKI MADE IN THE HOSPITAL TEN DAYS AFTER THE ACCIDENT THE PLAINTIFF FAILED TO ESTABLISH HIS BURDEN OF PROVING THAT AT THE TIME OF THE ACCIDENT THE TRUCK OF THE CORPORATE DEFENDANT WAS BEING OPERATED IN THE COURSE OF THE BUSINESS OF THE CORPORATE DEFENDANT.

The uncontradicted evidence required a finding that at the time of the accident the tractor and trailer of the defendant, Garford, was being driven on a route headed in the opposite direction from that in which it should have been driven if the driver were pursuing the shortest route to its destination; that there was upon the tractor at the time a passenger in direct violation of the rules of the defendant, Garford and that the direction in which the truck was traveling was toward the home of this passenger.

There is no other evidence as to the ultimate course to be taken by the operator of the truck.

There is evidence that at a point some distance from the accident he would have reached a route by which he could return to the route on which he should have traveled but there is no evidence other than that we have heretofore discussed on which the jury would have been warranted to find that it was the purpose or intention of the driver to take that other route when he reached it. The driver himself, in his testimony, said nothing about it and the evidence was without contradiction, that even if the driver was to have taken the route which would return him to the course in which he should have traveled, he must altogether have traveled about twice as far as he would travel if he had taken the direct route.

This was in direct violation of the law then in force requiring him to travel by the most direct route.

The court should have in mind in the case at bar that

at the time of the accident Glogowski had left behind him at least three routes which would have taken him directly to Worcester including the Worcester Turnpike; that he had already left behind him the last street by which he could have reached the Worcester Turnpike directly and that he was headed directly away from the Worcester Turnpike and away from Worcester in a northerly direction when he should have been traveling southerly; that the route which he was traveling would take him some 18 miles farther than he would be required to travel if he had taken the Worcester Turnpike; that it would take him through several small towns and over several long hills; that it was a two-lane highway instead of a four-lane highway; that it contained many curves from which, it necessarily followed, there would be a greater consumption of gasoline, a greater wear and tear on tires, the preservation of both of which were made imperative under the wartime regulations then in force and greater likelihood of accidents.

The case at bar is a stronger one for the corporate defendant than that of *Fleischner* v. *Durgin,* 207 Mass. 435, 436, (R., p. 262). That case, when applied in the case at bar, is sufficient authority to have required the judge to have directed a verdict for the defendant, Garford.

In the case at bar Glogowski had embarked upon a trip, the only apparent purpose for which was to carry a rider in violation of his master's orders, to a destination for the benefit of the rider, which trip would take him 15 miles away from his direct route with no evidence that he even intended to return to his direct route. In the *Fleischner* case the divergence from the direct route was six miles and yet the court held that it was a sufficient divergence to preclude the plaintiff from recovering. See also *Hartnett* v. *Grygmish,* 218 Mass. 258; *Stone* v. *Commonwealth Coal Co.,* 259 Mass. 360; *Vallavanti* v. *Armour & Co.,* 260 Mass. 417.

Thus it clearly appears that the trial court and the Circuit

Court of Appeals erred in two important respects prejudicial to the defendant, Garford. First, in permitting the jury to consider as evidence against the defendant, Garford, alleged statements made by Glogowski in the hospital a week or ten days after the accident and second, in failing to direct a verdict for the defendant, Garford, on the ground that the plaintiff had failed to establish that the truck was being operated at the time of the accident in the course of the business of the defendant, Garford.

CONCLUSION.

Your petitioners respectfully submit, therefore, that this Honorable Court should grant Certiorari in this case.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1947.

No. 345

GARFORD TRUCKING CORPORATION, *et al.*,
Defendants, Appellants, Petitioners,

vs.

JOSEPH MANN,
Plaintiff, Appellee, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

STEPHEN C. STRUFFOLINO,
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Attorneys for Respondent.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

SUBJECT INDEX.

	Page
Statement of the Case	1
Issues Involved on this Petition	2
Statement of Material Facts	3
Reasons Submitted for Denial of the Writ	10
Argument and Authorities	14
I. The Evidence and The Permissible Inferences Therefrom Warranted a Finding that Glogowski was Acting Within the Scope of His Employment at the Time of the Accident	14
II. The Declarations of Glogowski Were Admissible in Evidence	26
III. The Admission of Such Evidence, Even if Technically Erroneous, Did Not Constitute Harmful Error	31
A. The Corporate Defendant Waived Its Objections to the Competency of the Evidence	31
B. The Exception to the Charge was not Validly Taken	39
C. & D. The Evidence in Question was Merely Cumulative	40
Conclusion	42

Table of Cases.

Allen v. Trust Co. of Georgia, 326 U. S. 630, 636	11
Alpha Steamship Corp. v. Cain, 281 U. S. 642, 643	14
Anderson v. Abbott, 321 U. S. 349, 356	11
American Coorperative Serum Ass'n v. Anchor Serum Co., 153 F. (2d) 907, 912 (1946)	29
Arab Corporation v. Bruce, 142 F. (2d) 604, 608,, note 9	29
Aldrich v. Aldrich, 215 Mass. 164, 170	27, 28

II.

PAGE

Abele v. Dietz, 312 Mass. 685, 690, 691 ..... 36, 42
Bankers Trust Co. v. Higgins, 65 F. Supp. 836, 839.. 30
Bonino v. Caledonio, 144 Mass. 299, 302 31
Busby v. Electric Utilities Union, 323 U. S. 72, 75.... 12
Buckeye Powder Co. v. DuPont Powder Co., 248 U. S. 55, 65 29
Brady v. Doherty, 253 Mass. 518, 522 27
Bendett v. Bendett, 315 Mass. 59, 65, 66 ..... 32, 36, 42
Chicago and N. W. Ry. Co. v. McKenna, 74 F. (2d) 155, 157 30
Conklin v. Consolidated Railway, 196 Mass. 302 31
Comm. v. Dyer, 243 Mass. 472, 508..... 3
Cummings v. Republic Truck Co., 241 Mass. 292, 294, 295 ..... 16, 23, 24
Commonwealth v. Trefethen, 157 Mass. 180, 186, 190 ..... 27, 28
Crosby v. Mutual Life Ins. Co., 221 Mass. 461, 463, 464 27
Commonwealth v. Damon, 136 Mass. 441, 448, 449 27
Comm. v. Ramey, 243 Mass. 394, 397 27
Comm. v. Rubin, 318 Mass. 587, 588, 589 27
Commonwealth v. Parrotta, 316 Mass. 307, 312, 313.. ..... 32, 33, 36, 38, 39
Commonwealth v. Capalbo, 308 Mass. 376, 382 ..... 32, 35
Commonwealth v. Mannos, 311 Mass. 94, 114, 115 ..32, 35, 36
Comeau v. Beck, 319 Mass. 17, 19 35
Cummings v. National Shawmut Bank, 284 Mass. 563, 568 37
Comm. v. Johnson, 199 Mass. 55 37
Comm. v. Shephard, 313 Mass. 590, 598 39
Coneton v. Old Colony Street Railway, 212 Mass. 28, 29, 41
Comerford v. N. Y., N. H. & H. R. R. Co., 181 Mass. 528, 530 41
Duff v. Webster, 315 Mass. 102, 103 17
Donahue v. Voremberg, 227 Mass. 1, 5, 6 24

PAGE

Driscoll v. Scanlon, 165 Mass. 348, 349 24
Dt. of Columbia v. Pace, 320 U. S. 698, 702 ..... 11, 12
DiAngelo v. United Markets, Inc., 319 Mass. 143, 145 ..... 32, 33, 36, 38, 39
DuBois v. Powdrell, 271 Mass. 394, 397 ..... 30, 35
Douglas v. Holyoke Machine Co., 233 Mass. 573, 575 .. 35
Diaz v. U. S., 223 U. S. 442, 450 35
Duggan v. Bay State Street Railway, 230 Mass. 370, 383 41
Erie R. R. Co. v. Tompkins, 304 U. S. 64 11
Exchange Drug Co. v. Long, 281 U. S. 693, 694 10
Elmer v. Fessendon, 151 Mass. 359, 362 27
Eastman v. U. S., 153 F. (2d) 80, 84; cert. denied 66 S. Ct. 1342 ..... 30, 39, 40
Field v. U. S., 205 U. S. 292, 295, 296 10
Flournoy v. Wiener, 321 U. S. 253, 259 2
Forsyth v. Hammond, 166 U. S. 506, 514 10
Forsyth v. Hammon, 166 U. S. 504, 514 10
Fleischmer v. Durgin, 207 Mass. 435, at page 436 ..... 14, 16, 18, 23
Fitzgerald v. Boston & Northern Street Railway, 214 Mass. 435, 439 22
General Talking Pictures Corp. v. Electrirc Co., 304 U. S. 175, 178 11
Glaser v. United States, 289 F. 255, 256, cert. denied, 263 U. S. 700 29
Greater New York Live Poultry Chamber of Commerce v. United States, 47 F. (2d) 156, 159 (C. C. A. 2) 30
Greater New York C. of C. v. U. S. 47 F. (2d) 156, 159 .. 29
Greenough v. Tax Assessors, 91 L. E. 1274, 1277 (1946) 12
Gunning v. Cooley, 281 U. S. 90, 94 4
Hamilton Brown Shoe Co. v. Wolf Bros., 240 U. S. 251, 258 10

PAGE

Hawes v. Victoria Mining Co., 160 U. S., 303, 318 29
Higgins v. Cain Bros. Co., 317 U. S. 572, 574 42
Hillsborough v. Cromwell, 326 U. S. 620, 629, 630 12
Holmes v. City of Fayetteville, 281 U. S. 700 10
Houston Oil Co. of Texas v. Goodrick, 245 U. S. 440, 441 11
Hubbard v. Allyn, 200 Mass. 166, 171 30
Huddleston v. Dyer, 322 U. S. 232, 236 ..... 11, 12
Hayes v. Wilkens, 194 Mass. 223, 226 ..... 18, 21
Hayes v. Lumberman's Mutual Casualty Co., 310 Mass. 81, 84 18
Hoyt v. Russell, 117 U. S. 401, 404, 405 22
Hagar v. Norton, 188 Mass. 47, 52 27
Howes v. Colburn, 165 Mass. 385, 387 28
In Re New Hampshire Development Co., 62 F. Supp. 726, 727 22
Inness v. Boston, Revere Beach & Lynn R. R. Co., 168 Mass. 433, 434, 435 ..... 27, 28, 41
In Re Coleman, 53 Idaho 339 343, 344 28
Jackson v. Colonial Provision Co., Inc., 314. Mass. 177, 179, 180 ..... 30, 35
Janback v. Aamunkoitto Temp. Soc., 273 Mass. 45, 50 38
Kerr v. Modern Woodmen of America, 117 F. 593, 595 .. 30
Klaxton Co. v. Stentor, 313 U. S. 487, 497 12
Kay v. Audet, 306 Mass. 337, 338 3
Kelly v. Railway Express Agency, Inc., 315 Mass. 301, 302 4
LaAbra Mining Co. v. U. S., 175 U. S. 423, 499 13
Lawlor v. Woewe, 235 U. S. 522, 536 29
Layne v. Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 392, 393 10
Lewandowski v. Cohen, 237 Mass. 125, 126 ..... 18, 21, 23
Lane v. Moore, 151 Mass. 87, 89, 90-92 ..... 27, 28, 30, 31
Magnum Import Co. v. Coty, 262 U. S. 159, 163 10
McArthur v. U. S., 315 U. S. 787 10

PAGE

Myers v. Reading Co., 91 L. E. 1199, 1203 (1946) 4
Mathewson v. Edison Electric Illuminating Co. of Boston, 232 Mass. 576, 581 .....16, 18, 21, 24, 26, 32, 41
McDonough v. Vozzela, 247 Mass. 552, 558 16
McKeever v. Ratcliffe, 218. 17, 20, 21 18
Mahan v. Perkins, 274 Mass. 176, 179 27
Malone v. Walsh, 315 Mass. 484, 490 27
McCoy v. Jordan, 184 Mass. 575, 576, 577 28
Morrison v. Lawrence, 186 Mass. 456, 458 32
Milwaukee Mechanics Ins. Co. v. Oliver, 139 F. (2d) 405, 407 32
Mahoney v. Harley Private Hospital, 279 Mass. 96, 100. 35
National Labor Relations Board v. Southern Wood Preserving Co., 135 F. (2d) 6067, 607..... 29
Norwood v. Great American Indemnity Co., 146 F. (2d) 797, 799 .....12, 26, 32, 33
Nowell v. Chipman, 170 Mass. 340, 343, 344 31
Noyes v. Gagnon, 225 Mass. 580, 588 32
O'Leary v. Fash, 245 Mass. 123, 125 24
Orpin v. Morrison, 230 Mass. 529, 432 37
Ouimette v. Harris, 219 Mass. 466, 470 18
Pilgrim v. MacGibbon, 313 Mass. 290, 292 3
Pigeon's Case, 216 Mass. 51, 54 .....16, 22
Pickens v. Davis, 134 Mass. 252, 257, 258 .....26, 28, 31
Partridge v. United Elastic Corp., 288 Mass. 138, 141 .. 27
Potter v. Baldwin, 133 Mass. 427, 428, 429 .....28, 39
Perivoliotis v. Eveleth, 251 Mass. 444, 446, 447 .....32, 36
Pochi v. Brett, 319 Mass. 197, 203 35
Palmer v. Hoffman, 318 U. S. 109, 119 .....30, 39, 40
Rorick v. Devon Syndicate, 307 U. S. 303..... 2
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 206.... 12
Reynolds v. Denholm, 213 Mass. 576, 578 .....18, 23
Ritchie v. Walker, 63 Conn. 155, 161, 162 (cited with approval in Mathewson v. Edison Elec. Ill. Co., 232 Mass. 576, 581) 18, 21, 23

PAGE

Riley v. Standard Oil Co., 231 N. Y. 301, 305, 306, (cited in support of Cummings v. Republic Truck Co., 241 Mass. 292, 294, 295) 18, 21, 23
Ryder v. Board of Health of Lexington, 273 Mass. 177, 179, 180 ..... 32, 36, 37
Rapson v. Leighton, 187 Mass. 432, 435 35
Ryan v. DiPaolo, 313 Mass. 492, 494 35
Randall v. Peerless Motor Car Co., 212 Mass. 352, 384 .. 37
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 509 11
Standard Oil Co. of New Jersey v. Neville, 48 F. (2d) 580, 581 42
Schroepfer v. A. S. Abell Co., 138 F. (2d) 111, 116; cert. denied, 321 U. S. 763 3
Sawyer's Case, 315 Mass. 75, 79 ..... 23, 24, 25
Shailer v. Bumstead, 99 Mass. 112, 122, 123 27
State v. Journey, 115 Conn. 344, 351 28
Sylvester v. New York, New Haven & Hartford R. R., 217 Mass. 148, 152 30
Snipes v. Augusta-Aiken Ry. & Elec. Co., 151 S. C. 391, 396 32
Stearns v. Warren, 284 Mass. 268, 275 35
Spiller v. Atchison, Topeka & Sante Fe, 253 U. S. 117, 130 35
Solomon v. Dabrowski, 295 Mass. 358, 359, 360 39
Salonen v. Paanenen, 1947 Mass. Ad. Sh. 29, 36 ..... 30, 39
Tobin v. Walkin Shaw, 23 F. C. 1346, 1347, 1348 (C. C.), Fed. Cas. No. 14,070 29
Trouser Corporation v. Goodman & Theise, 153 F. (2d) 284, 285 ..... 32, 33
Talty v. Freedman Savings & Trust Co., 93 U. S. 321, 326 3
Town of Burlington v. Dunn, 318 Mass. 216, 221 22
The Wahkeena, 51 F. (2d) 106, 108 22

PAGE

United States v. Fried, 149 F. (2d) 1011, 1013 32
United States v. Johnston, 327 U. S. 106, 113..... 11
U. S. v. Rimer, 220 U. S. 547, 548..... 10
U. S. v. Schuchhardt, 49 F. Supp. 567, 568 (1943)..... 29
U. S. v. Jogwick, 51 F. Supp, 2, 3..... 29
U. S. v. Schlotfeldt, 136 F. (2d) 935, 938..... 29
U. S. v. Gentry, 119 F. 70, 73..... 30
U. S. v. Wells, 283 U. S. 102, 113..... 30
U. S. v. O'Donnell, 303 U. S. 501, 508..... 11
U. S. v. Commercial Credit Co., 286 U. S. 63, 67..... 11
U. S. v. Daily, 139 F. (2d) 7, 9 .....39, 40
Ventromile v. Malden Electric Co., 317 Mass. 132, 135 .. 35
Walling v. Jacksonville Paper Co., 317 U. S. 564, 570 42
Washington Fidelity Insurance Co. v. Burton, 287 U. S. 97, 101, 102..... 10
Weston v. Barnicoat, 175 Mass. 454, 456 30
Wright v. Bragg, 106 F. 25..... 30
Walsh v. Feinstein, 251 Mass. 109, 110, 111 3
Worcester County Park Commission v. United States, 143 F. (2) 688, 694, 695 .....12, 26
Westchester County Park Commission v. United States, 143 F. (2d) 688, 694, 695; cert. denied, 323 U. S. 726 .. 32
Zucht v. King, 260 U. S. 174, 176, 177..... 10

STATUTES.

Act of February 13, 1925, Chapter 229, amending #240(2) of the Judicial Code, 43 Sts. 938, 28 U. S. C. A. #347 2
Federal Rules of Civil Procedure:
Rule 41 b 2
Rule 50 2
Rule 61 (28 U. S. C. A. ff. #723c) 33
Rule 51 (28 U. S. C. A. ff. #723c) 30, 39, 40

PAGE

Judicial Code, as amended:
Sec. 269 (28 U. S. C. A. #391) 33
Mass. G. L. (Ter. Ed.) C. 231, #132 32
Rule 38 (2) of the Revised Rules of the Supreme Court of the United States 2
Rule 38 (5) (b) of the Revised Rules of the Supreme Court 10, 12
Rule 43(a) F. R. C. P. 12, 13

MISCELLANEOUS.

Restatement, Agency, #289, Comment C 29
Starkie, Evidence, (10th Am. Ed.) 89 27
1947 World Almanac:
p. 728 22
p. 727 22
Wigmore Evidence, (3rd Ed.):
Vol. VI, #1729, p. 91, #1714, p. 60, #1726 (2), pp. 87, 88; Vol. II, ##233, 241, 242 (3) 27
Vol. VI, #1715, p. 62; #1726, pp. 87, 88 29
Wigmore, Evidence, (3rd Ed.):
#106, note 1 31

Supreme Court of the United States

October Term, 1947.

No. .....

GARFORD TRUCKING CORPORATION ET AL., *Petitioners.*

v.

JOSEPH MANN, *Respondent.*

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This action was originally brought by the plaintiff in the Massachusetts Federal District Court seeking to recover damages for personal injuries sustained by him on May 9, 1945, on Concord Street, a public highway in that part of the Town of Framingham, Massachusetts, known as Saxonville, as a result of a collision between the plaintiff's automobile and a trailer-truck owned by the defendant Garford Trucking Corporation (R. 61, 224), and being driven by the defendant, J. Albert Glogowski.

The case was tried before a judge and a jury. The case was submitted to the jury on counts one and four of the complaint, predicated upon negligence, respectively, of the corporate and the individual defendant, other counts of the complaint being dismissed. (R. 8, 9, 244, 245.) On November 1, 1946, the jury returned a verdict for the plaintiff on said counts one and four against each defendant in the sum of twenty-nine thousand dollars ($29,000.00) (R. 9, 10), and judgment against each defendant in the latter sum was entered on the verdicts on November 5, 1946 (R. 10).

The defendants appealed to the Circuit Court of Appeals for the First Circuit, which Court, after a hearing, filed a

decision on July 24, 1947 (.... F. (2d) ...., not yet reported) affirming the judgment of the District Court.

The defendants now proceed in this Court on a petition for a writ of certiorari (under the Act of February 13, 1925, Chapter 229, amending #240(a) of the Judicial Code, 43 Sts. 938, 28 U. S. C. A. #347) to review the aforesaid decision of the Circuit Court of Appeals.

ISSUES INVOLVED ON THIS PETITION FOR CERTIORARI.

"Of the various questions raised below and briefed here, only the questions specifically brought forward by the petition for the writ of certiorari will be considered." *Rorick v. Devon Syndicate,* 307 U. S. 299, 303. *Flournoy v. Wiener,* 321 U. S. 253, 259, and cases cited. Rule 38(2) of the Revised Rules of the Supreme Court of the United States.

Although both defendants appealed to the Circuit Court of Appeaus and both defendants have joined in this petition for a writ of certiorari, the questions raised and argued in the Circuit Court of Appeals and in the present petition involved solely the correctness of the judgment entered against the corporate defendant.* And insofar as the

* The defense of contributory negligence was waived by the defendants during the course of the trial in the District Court. (R. 263)

During the course of the oral argument in the Circuit Court of Appeals it was conceded by counsel for the defendants that the jury could find that the driver Glogowski was negligent in his operation of the motor truck and that such negligence contributed to cause the plaintiff's injury. In any event no question was saved in the District Court, or was raised by the defendant's Statement of Points or was argued on the appeal in the Circuit Court of Appeals regarding the sufficiency of the evidence in the latter respects. No motion for a directed verdict under Rule 50 (F. R. C. P.) nor for dismissal under Rule 41b (F. R. C. P.) was presented in the District Court with respect to count four of the complaint predicated on negligence of the individual defendant Glogowski. Various other objections and exceptions taken by counsel for the defendants during the course of the trial (R. 87, 143, 168, 202, 203, 206, 217, 224, 233, 239, 109, 118, 121, 122, 268-270, 249, 109, 118,

case against the corporate defendant is concerned, the only contentions made by said corporate defendant below and in this petition are: (1) That the trial judge and the Circuit Court of Appeals erred in their rulings that testimony of certain declarations made by Glogowski (hereinafter set out) three to ten days after the accident could be taken into consideration by the jury as evidence of Glogowski's state of mind, purpose, belief or intention in travelling on a particular route at the time of the accident as bearing on the question whether he was then acting within the scope of his employment by the corporate defendant; and (2) that in the absence of the foregoing testimony the evidence in the case was insufficient to warrant the jury in finding that at the time of the accident Glogowski was acting within the scope of his employment by the said corporate defendant.

Statement of Material Facts.

In determining the sufficiency of the evidence to warrant the finding that Glogowski was acting within the scope of his employment "the evidence must be viewed in its aspects most favorable to the plaintiff", *Pilgrim v. MacGibbon,* 313 Mass. 290, 292; *Walsh v. Feinstein,* 251 Mass. 109, 110, 111. "The issue was for the jury, if anywhere in the evidence from any source derived, any facts or combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff. If such

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121, 122, 265), and assignments of errors predicated thereupon, must be deemed abandoned and waived, since none of such objections or exceptions, or assignments of errors were briefed or argued in the Circuit Court of Appeals or are briefed or argued or set forth in the present petition. *Comm. v. Dyer,* 243 Mass. 472, 508. *Kay v. Audet,* 306 Mass. 337, 338. *Talty v. Freedman Savings & Trust Co.,* 93 U. S. 321, 326. *Schroepfer v. A. S. Abell Co.,* 138 F. (2d) 111, 116; cert. denied, 321 U. S. 763.

combination of circumstances could be found it is immaterial how many other facts or combinations of circumstances could be found which would lead to conclusions adverse to the plaintiff." *Kelly v. Railway, Express Agency, Inc.*, 315 Mass. 301, 302. "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear where there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Myers v. Reading Co.*, 91 L. E. 1199, 1203 (1946), 67 S. Ct. 1339. *Gunning v. Cooley*, 281 U. S. 90, 94.

The following facts could be found by the jury:

At the time of the accident, on May 9, 1945, the defendant Glogowski was a truck driver in the general employment of the defendant, Garford Trucking Corporation, of South River, New Jersey. (R. 175, 179, 257.) He had been so employed for one and one-half years previous to the accident. (R. 237.) The defendant corporation had a branch office or terminal in Plainville, Massachusetts, part of North Attleboro, Mass., which was in charge of one McCarthy who was the general manager and dispatcher. (R. 179, 234.) On the day before the accident Glogowski had arrived at the Plainville terminal from New Jersey with a truck and an empty trailer. (R. 176, 234.) At ten o'clock on the morning of the accident he was called to work and reported for duty at said terminal with such truck and trailer. (R. 176, 179.) At that time he received instructions from McCarthy to take his truck and empty trailer to the Draper wool storehouse in Framingham,

Mass., leave the empty trailer there, pick up a trailer loaded with wool, and thence to proceed to the Garford main terminal in South River, New Jersey, or to Trenton, New Jersey, (R. 225) which was to be the end of his run. (R. 176, 179.) In accordance with such instructions Glogowski went from Plainville to Draper's in Framingham, a distance of 27 miles (R. 235), (Framingham being almost directly due north of Plainville) dropped the empty trailer, and picked up a trailer loaded with bales of wool with which he was to proceed to New Jersey. (R. 176.)

From the Draper storehouse Glogowski proceeded three-fourths of a mile to the center of the Town of Framingham. There he took Route 126, known as Concord Street which led from the Town of Framingham northerly to a point in Framingham where Route 126 crosses and goes over Route 9, known as the Worcester Turnpike, by way of a bridge or overpass. (R. 47, 48, 62, 136, 139.) Draper's was two miles from the Worcester Turnpike. (R. 45.) Glogowski (according to his own testimony) "took the most direct route [he] knew of" from Draper's to the Turnpike: he couldn't remember the streets or route numbers he followed. (R. 179, 180.) Then he continued to follow the same route, Route 126, in a generally northerly direction from the Worcester Turnpike up to the scene of the accident (R. 184), which occurred at approximately 3:15 or 3:20 in the afternoon, (R. 135, 226, 80) on Concord Street (Route 126) in that part of Framingham known as Saxonville, at the corner of the intersection of Concord Street with Cherry and A Streets. (R. 31, 16, 12-17, 127.) The place of the accident was one-half mile or one mile from the intersection of Route 126 with Route 9, the Worcester Turnpike. (R. 47, 143.)

Route 126 (Concord Street), from the point where it overpasses the Worcester Turnpike in Framingham, and

from the point of the accident, goes northerly into Wayland, Mass. In Wayland, Route 126 joins Route 20, which junction is five miles north of the place where the accident happened in Saxonville. (R. 42, 44, 48.) From Wayland you swing around over Route 20 in a westerly direction, which latter route carries you up through Marlboro, Mass.; thence to a point seven miles just outside of Worcester, on the Boston side of Worcester, at which point Route 20 crosses Route 9 (the Turnpike) by means of an underpass bridge, and swings out from there, as a four-lane highway, into Connecticut 'till it merges with Route 15 which leads all the way down to New York and New Jersey. (R. 42, 44, 49, 60, 63.) Route 20, (also known as the Old Boston Post Road) from Wayland, Marlboro and onward, is a through way; there are stop signs on each side of it; it is a common highway for travel, and is the main route used for transportation into New York and New Jersey. (R. 42, 60, 63.)

There was evidence that, from the point in Framingham where Route 126 went over the Turnpike (Route 9), Glogowski could have turned off Route 126 and taken Route 9 itself, which went to Worcester and ultimately led to the same junction where Route 20 underpassed Route 9, seven miles the Boston side of Worcester. (R. 43, 44, 47, 49, 62.) There was evidence that the distance between the latter junction and the intersection of Route 126 with Route 9 in Framingham, by way of Route 9 on the Turnpike, was about fifteen miles; that the distance between the same two points going by way of Wayland and Sudbury would be about twenty-eight miles. (R. 64.)

Riding on the truck with Glogowski at the time of the accident was a sailor, one Donald Chasse, who lived on a street in Saxonville (Danforth Street) which branched off

Route 126, one-half to three-quarters of a mile from the place of the accident, towards the Town of Saxonville (R. 75, 135, 137, 151). Glogowski picked up the sailor on Route 126 near the point where Route 126 overpasses Route 9, a half mile or so from the scene of the accident. (R. 136, 47, 143.) The jury could find that the exact point at which the sailor boarded the truck was beyond the intersection of Route 126 with Route 9 on the Saxonville side headed towards Saxonville (R. 136, 138, 140); that the rear of the truck (which was 40 feet long) was at that time 100 feet beyond the northerly line of the Turnpike (R. 141); that the sailor was going home on an overnight pass, that he didn't know Glogowski and had never seen him before; that when he got on the truck it started up promptly,—"Glogowski asked him where he was going. The sailor said Saxonville—"; (R. 180) that there was no further talk as to where the rider was going (R. 142) and no talk with the driver relative to the sailor's address in Saxonville or as to how he would get from Route 126 to Danforth Street on which the sailor lived. (R. 166.)

There was further evidence, as hereinafter set out, that Route 9 from Framingham towards Worcester carried much heavier traffic (mostly of the truck and trailer character) and was much hillier than Route 20.

During the course of the trial the plaintiff, on direct examination, testified to the following conversation relative to the accident which took place three to ten days after the accident (R. 124-129; 91-94) at the Framingham Hospital, where the plaintiff and Glogowski were confined, between the latter and one Orrin (Red) Davis who was also a patient in the hospital:

> "Red [Davis] asked Glogowski in the course of the conversation what he was doing on that other road. He said, 'You told me you were going to Worcester.'

"Red said to Glogowski, 'You told me before you were going to Worcester. Why did you go across there?' So Glogowski told Red, 'Oh, I usually take this road. I hit No. 20 over there, and oh, boy! then you can open it up, zoom.' " (R. 93.)

This conversation was admitted subject to the objection of counsel for the defendants whereupon the court ruled that the statements made by Glogowski bound only Glogowski and not the defendant corporation. (R. 93.)

On cross-examination of the plaintiff, counsel for the defendants asked the witness to state the entire conversation and to repeat it, and examined the plaintiff fully concerning the same conversation. (R. 95, 96.) Thereupon the plaintiff testified that "the two drivers exchanged their experiences as to their driving along certain routes" and "told each other which routes they usually take and which they find better and which they do not"; that this "Red" asked Glogowski "why he takes a road in that direction", to which Glogowski relied that "he finds this much better, not as congested as the other route"; that Glogowski said, "When you hit that road you can open up and go zoom"; further, that "Red" asked Glogowski, "How did this happen?", to which Glogowski replied, "Well, I just couldn't keep it under control. They overloaded me"; that Glogowski also mentioned that this was his third accident and he talked about it in a sort of bragging way; that he said, "Boy, it takes me to break them up, doesn't it?"; that he said, "This is my third accident. It takes me to break them up" or something like that. (R. 97, 98.)

Later in the trial Orrin Davis himself testified, on direct examination by plaintiff's counsel, and subject to defendants' objection, to the same conversation had by the witness with the defendant Glogowski at the hospital, as follows:

"He told me he was going down Concord Street and that he had a high load, that he was top heavy, and that all he remembered about the accident, he just went over. * * * I asked him where he came from. He said he came from Plainville and went to the Draper wool shop and picked up his trailer there, and I asked him where he was going. He said New Jersey, so I asked him, 'What the h--- were you going that way for?' He said, 'I go that way because I can make better time.' And I said, 'Why didn't you take the Turnpike'? He said, 'I go that way to make better time.' * * * He said he could really wreck them for you; that that was his third accident." (R. 127.)

On cross-examination of the same witness, counsel for the defendants here again questioned the witness in reference to the same statements made by Glogowski to which the witness replied in substantially the same above cited language. (R. 130, 134.)

In reference to the foregoing conversations testified to by the plaintiff and the witness Davis, the court in its charge to the jury instructed them as follows:

"Now, you can take that evidence into consideration as evidence of Glogowski's state of mind at the time he travelled over Concord Avenue, and you can take it in consideration in deciding the question—as to what his purposes were. Was his purpose to perform his master's business in going over Concord Avenue in that connection? You can determine that evidence. Because that is evidence of his state of mind. And I charge you it is competent for you to consider in * * * determining whether or not he was working within the scope of his employment, whether when he went along Concord Avenue as he did at the time of the accident, he was performing his master's business or was intending to perform his master's business." (R. 260, 261.)

Counsel for the defendants excepted to the above portion of the charge (R. 269).

Reasons Submitted for Denial of the Writ.

(a) WANT OF SUBSTANTIAL OR IMPORTANT QUESTION.

The questions presented by petitioners for review do not, either from their character or importance, require the exercise of the sound judicial discretion of this Court in granting a writ of certiorari. The questions are of local significance only and are not of such general interest and importance as under the rules and practice of this Court warrant their review on certiorari. *Washington Fidelity Insurance Co. v. Burton,* 287 U. S. 97, 101, 102. Rule 38 (5) (b) of the Revised Rules of the Supreme Court. "It is solely when questions of peculiar gravity and general importance are involved that the power of this Court to require a case to be certified can be properly invoked" *U. S. v. Rimer,* 220 U. S. 547, 548. *Forsyth v. Hammond,* 166 U. S. 506, 514. *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U. S. 387, 392, 393. *Magnum Import Co. v. Coty,* 262 U. S. 159, 163. *McArthur v. U. S.,* 315 U. S. 787. *Zucht v. King,* 260 U. S. 174, 176, 177. *Exchange Drug Co. v. Long,* 281 U. S. 693, 694. *Holmes v. City of Fayetteville,* 281 U. S. 700. "The jurisdiction to grant certiorari is not exercised merely to give the defeated party in the Circuit Court of Appeals another hearing" *Magnum Import Co. v. Coty,* 262 U. S. 159, 163. Importance of the case to the applicant or to private interests because of the amount of money involved, or otherwise, is immaterial. *Field v. U. S.,* 205 U. S. 292, 295, 296. *Hamilton Brown Shoe Co. v. Wolf Bros.,* 240 U. S. 251, 258. *Forsyth v. Hammond,* 166 U. S. 504, 514.

The controverted question in this case is whether the evidence sufficed to establish a finding that Glogowski was acting within the scope of his employment at the time of the accident, which was primarily a question of fact. The pro-

priety of submitting this question to the jury depended essentially upon an appreciation of the evidence and the inferences which could be drawn from it. "Granting of a writ of certiorari would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Electric Co.*, 304 U. S. 175, 178. *Houston Oil Co. of Texas v. Goodrick*, 245 U. S. 440, 441. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 509. *United States v. Johnston*, 327 U. S. 106, 113. "Having heard all the evidence the trial court concluded that there was sufficient evidence to warrant a finding in favor of the respondent and the Circuit Court of Appeals reached the same result." *Houston Oil Co. of Texas v. Goodrick*, 245 U. S. 440, 441. "Those findings, being concurrent findings of the two lower courts will be accepted here without re-examination of the evidence." *Allen v. Trust Co. of Georgia*, 326 U. S. 630, 636. *Anderson v. Abbott*, 321 U. S. 349, 356. *U. S. v. O'Donnell*, 303 U. S. 501, 508. *Dt. of Columbia v. Pace*, 320 U. S. 698, 702. *U. S. v. Commercial Credit Co.*, 286 U. S. 63, 67.

(b) No Conflict With Applicable Local Decisions.

The ruling of the District Court and the Circuit Court of Appeals, that the remarks of Glogowski were admissible against the corporate defendant to establish his state of mind, purpose, belief or intention in taking Route 126 out of Framingham rather than Route 9, is not in conflict with applicable decisions of the Commonwealth of Massachusetts. (See cases and authorities cited in argument, *infra*.) If this contention is correct, the writ must be denied without resort to decisions in the federal courts. "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties." *Huddleston v. Dyer*, 322 U. S. 232, 236. *Erie R. R. Co. v. Tompkins*, 304

U. S. 64. *Greenough v. Tax Assessors,* 91 L. E. 1274, 1277 (1946). *Klaxton Co. v. Stentor,* 313 U. S. 487, 497.

If, however, there is a permissible difference of opinion in the decisions of Massachusetts on such evidence question, this Court is guided by the rule that "ordinarily it accepts and therefore does not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. When (this Court) is called upon to decide matters of state law, the expression of the views of the judges of such intermediate federal appellate courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least highly desirable and an important aid to this Court's determination of state law questions." *Huddleston v. Dyer,* 322 U. S. 232, 237. *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 206. *Hillsborough v. Cromwell,* 326 U. S. 620, 629, 630. "Only in exceptional cases will this Court review a determination of questions of local law by the Circuit Court of Appeals for the District." *Busby v. Electric Utilities Union,* 323 U. S. 72, 75. *District of Columbia v. Pace,* 320 U. S. 698, 702, 703.

(c) No Conflict in Federal Decisions.

In any event the writ should be dismissed, since irrespective of local or state decisions, the evidence was admissible under the federal decisions (See cases and authorities cited in argument, *infra)* and the federal law, where more liberal, governs. Rule 43(a) F. R. C. P. *Norwood v. Great American Indemnity Co.,* 146 F. (2d) 797, 799. *Worcester Park Commission v. U. S.,* 143 F. (2d) 688, 694, 695. The petition does not set forth any decision of the circuit Court of Appeals, interpreting the Massachusetts law on the evidence question involved, which is in conflict with the decision of the Circuit Court below. Rule 38(5)(b), Supreme

Court Rules. The decision of the Circuit Court is not in conflict with the decision in *LaAbra Mining Co. v. U. S.*, 175 U. S. 423, 499, as asserted by the petitioner. The latter case in no way involves any question in reference to the admissibility in evidence of declarations of state of mind, purpose or intention.

(d) No Harmful or Prejudicial Error.

The Circuit Court of Appeals, in affirming the judgment of the District Court, ruled that the evidence of Glogowski's remarks was admissible under Massachusetts law, but that in any event, such evidence was admissible under federal law which governs under Rule 43(a) F. R. C. P.

In further support of the correctness of the judgment of the District Court, the present respondent argued fully and comprehensively in the Circuit Court of Appeals and argues fully in this Court that the testimony of Glogowski's remarks, even if technically erroneous, did not constitute harmful or prejudicial error for the following reasons:

(1) The corporate defendant waived its objections or exceptions to the admission of the evidence as against said defendant.

(2) Error, if any, in receiving proof of the declarations was harmless since the fact that Glogowski was acting within the scope of his employment at the time of the accident was fully established by other evidence in the case, and since the very intention sought to be proved by the declarations was established by other evidence in the record.

(3) The exception of the corporate defendant to the judge's charge ruling that to the declaration of Glogowski were admissible as against said defendant, was not validly taken.

In determining whether it will grant certiorari this Court will also consider the above questions. It need not limit its determination to the grounds upon which the Circuit Court of Appeals put its decision. *Alpha Steamship Corp. v. Cain,* 281 U. S. 642, 643.

Argument and Authorities.

I. The Evidence and the Permissible Inferences Therefrom Warranted a Finding that Glogowski Was Acting Within the Scope of His Employment at the Time of the Accident.

The principal governing the rights of the parties is well stated in *Fleischner v. Durgin,* 207 Mass. 435, at page 436 [which language was cited by the judge in his instructions to the jury]:

> "The master is liable for the act of a servant in charge of his vehicle when the latter is acting *in the main* (italics ours) with the master's express or implied authority upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations or is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged."

In the instant case in accordance with the foregoing evidence, most of which is not in dispute, Glogowski followed the explicit directions of his employer in proceeding with his truck and trailer from Plainville to Draper's in Fram-

ingham and there picking up a trailer loaded with wool which he had been instructed to transport to New Jersey. From Draper's he proceeded with said truck and trailer to the center of the Town of Framingham (a distance of three-fourths of a mile) from which point he started to follow Route 126 (Concord Street) which led to the point of its intersection with Route 9, the Turnpike, approximately two miles further, and he continued to follow Route 126 up to the scene of the accident which was one-half or one mile from the latter intersection. He had taken "the most direct route he knew of" from Draper's to the Turnpike.

[Although there was some evidence of other routes or means of travel to Worcester from Draper's (R. 47, 62), branching off the course which Glogowski followed to the Turnpike, there was no evidence that such other means of travel were more direct routes to New Jersey than the Turnpike or the route which Glogowski was travelling on at the time of the accident. And no argument is made by the corporate defendant that Glogowski was acting outside the scope of his employment is not pursuing such other routes.]

At the place of the accident Glogowski was travelling, with his truck and trailer loaded with the wool for delivery to New Jersey, on a route (126) which led directly to Route 20 (five miles from the scene of the accident), which latter route was described in the evidence as a "through way", "a common highway for travel" and "a main route used for transportation into New York and New Jersey". (R. 42, 60, 63.)

On the above evidence the jury could find that at the time of the accident Glogowski was following his employer's explicit instructions and acting with its express authority in the performance of his duty of transporting the truck and trailer loaded with wool into New Jersey; and

that he was pursuing a route to New Jersey which he could reasonably have been expected by his employer to take in the performance of such duty.

Fleischner v. Durgin, 207 Mass. 435, 436.

Mathewson v. Edison Electric Illuminating Co. of Boston, 232 Mass. 576, 581.

Cummings v. Republic Truck Co., 241 Mass. 292, 294, 295.

Pigeon's Case, 216 Mass. 51, 54.

In support of its argument that Glogowski was acting outside the scope of his employment at the time of the collision, the principal contention of the corporate defendant is, that, from the point of intersection of Route 126 with Route 9 (the Worcester Turnpike), Glogowski did not travel the more direct or shorter route to the junction of Route 9 with Route 20, which the defendant contends would have been via Route 9; and furthermore that such alleged deviation from the more direct route was contrary to express instruction of the defendant corporation.

The jury could find, however, that the only instructions given to Glogowski were to proceed from the Draper storehouse in Framingham to South River or Trenton, New Jersey. The defendant Glogowski so testified. (R. 176, 179). Such were the limit of the instructions given to Glogowski as included in the answer of the defendant corporation to the interrogatory relative to any directions given Glogowski in respect to the trip in question. (R. 225.) The sole evidence that any instruction was given Glogowski as to the route to be taken by him was the testimony of the corporation's witness, McCarthy, to the effect that he told Glogowski to take Route 9 to Route 20. (R. 234.) The jury were not required to believe this testimony of the defendant's witness, even if it were uncontradicted. *McDonough v. Vozzela,* 247 Mass. 552, 558.

Duff v. Webster, 315 Mass. 102, 103. Moreover, the latter testimony was contradicted as above stated; and was greatly discredited on cross-examination of the witness. (R. 238 ff.)

Concerning the argument of the defendant corporation that Glogowski did not take the most direct route from the intersection of Route 126 and 9 to the intersection of Route 20 with 9, it should be noted at the outset that the jury could disbelieve the testimony of the police officer Donnelly to the effect that the distance between the two above stated intersections via Route 9 was 15 miles, whereas the distance between the same two points via Route 126 and 20, was 28 miles. (R. 64.) Under such circumstance there was no evidence binding on the plaintiff that Glogowski took a less direct route to the junction of Route 9 and 20. Moreover, the testimony of Donnelly was to the effect that the distance between the two junctions in question via *Wayland and Sudbury* would be about 28 miles. (R. 64.) "The jury could find that such evidence was not evidence of the distance between the two points in question via *Wayland and Marlboro,* which was established by previous evidence to be another means of travel between the same two points". In this state of the record it cannot be said that there was evidence, even if it was binding on the plaintiff, that the route which Glogowski was travelling to the junction of Routes 20 and 9 was less direct than via. Route 9, or in any event, that the former means of travel was 13 miles longer than the latter and the means of travel which the jury could find Glogowski was following.

However if it be assumed on the state of the record [and the plaintiff does not concede this point] that there was testimony, and testimony by which the plaintiff was bound, that Route 126 to Route 20 in Wayland and thence to New Jersey, which course Glogowski could have been found to

be pursuing, was a route of travel 13 miles less direct than Route 9 to the same destination, such isolated facts did not on all the circumstances require a finding as a matter of law that Glogowski was acting outside the scope of his employment in following the less direct route.

"Deviations by a servant from the regular course, as travelling by a longer route than is required to reach his destination in the performance of his master's business, is not conclusive evidence that he is not then acting within the scope of his employment."

Mathewson v. Edison Electric Illuminating Co. of Boston, 232 Mass. 576, 581.

Fleischner v. Durgin, 207 Mass. 435, 436.

Hayes v. Wilkens, 194 Mass. 223, 226.

Reynolds v. Denholm, 213 Mass. 576, 578.

Lewandowski v. Cohen, 237 Mass. 125, 126.

McKeever v. Ratcliffe, 218 Mass. 17, 20, 21.

See also:

Ouimete v. Harris, 219 Mass. 466, 470.

Hayes v. Lumberman's Mutual Casualty Co., 310 Mass. 81, 84.

"In by far the greater number of such cases where the master's responsibility turns, as in the present case, principally upon the mere extent of deviation, the question is and must remain a question of fact depending upon the degree of diviation and all the attendant circumstances" . . . In order to determine or suspend the master's responsibility there must be "not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own'."

Ritchie v. Walker, 63 Conn. 155, 161, 162 (cited with approval in *Mathewson v. Edison Elec. Ill. Co.*, 232 Mass. 576, 581).

Riley v. Standard Oil Co., 231 N. Y. 301, 305, 306, (cited in support of *Cummings v. Republic Truck Co.*, 241 Mass. 292, 294, 295).

In the instant case there was evidence of comparison between Route 9 (the Worcester Turnpike) and Route 20 as respected the volume and type or character of traffic that moved along these respective routes at the approximate time of day at which the accident occurred, in the vicinity of the location of the accident, in and around the Town of Framingham, and thence out to New York. The jury could find from the testimony that on the average day, between 2:00 and 3:30 in the afternoon, as traffic moved on these respective routes in and around the Town of Framingham and thence out to New York, Route 9 (the Worcester Turnpike) carried the heaviest volume of traffic as compared with Route 20 (R. 66, 67, 68); that regarding the character and type of traffic that moved along these two highways on the average day, the heaviest traffic at such hours of the day was trucks and such heaviest traffic went on Route 9 (R. 67, 68); that on the average day of the week in the afternoon, around two, three or four o'clock, or between the hours of two and four, you get such heavy traffic on Route 9 that there is a continual flow of trucks and cars moving both directions fifty feet apart or so, continuously (R. 68), —"very heavy traffic" (R. 68),—"a flowing and continual stream of traffic" (R. 69); that such vehicles "are stepping right along" (R. 69); that two thousand vehicles an hour, four thousand between the hours of two and four in the afternoon every average day during the week, travel along the turnpike or Route 9 going by a given point thereon; that at that time of day the largest percentage, 75 to 80 per cent, of such vehicles are trucks, the majority of them going west towards New York. (R. 69.)

Respecting the volume and character of hills along these two different routes to the junction of Route 9 with Route 20, there was evidence that Route 20 had less hills than

Route 9, (R. 43) and less hills of considerable height to the apex than Route 9 (R. 43); that Route 9 had some very steep hills on it (R. 42); that there was one steep hill on Route 20 coming into Marlboro, but that Route 9 on the way to Worcester had five or six very steep hills (R. 43, 44).

The vehicle being operated by Glogowski was a big Autocar truck attached or linked to a Freuhauf tractor-trailer, (R. 176, 24, 25) which were two separate units. (R. 60.) The truck and trailer was 40 feet long. (R. 236, 141.) The tractor was 12 feet wide from wheel to wheel. (R. 142.) The trailer was 30 feet long (R. 20), about 8 feet wide (R. 177, 178, 236), 7½ feet high, from the floor thereof, and 11 feet 9 inches high from the ground. (R. 178, 236.) The trailer was heavily loaded—, overloaded—, (R. 97, 130) with large and heavy bales of wool, which bales were 15 feet long, and 6 feet wide (R. 142, 176, 20, 31, 61) and weighing at least 40,000 pounds.

It is a matter of common knowledge that motor trucks, (particularly a large tractor-trailer of the latter dimensions heavily loaded with wool) can be operated much more easily, quickly and safely over a road with little or no traffic, no hills, or no very steep hills, than over a road where their progress is impeded by the presence of hills or very steep hills, and the presence of a continual flow or stream of other vehicles and traffic, especially when the greatest percentage of such traffic is heavy traffic of the truck and trailer character.

> "These are proper matters to be considered in determining whether the deviation from a regular or more direct route is an abandonment of the master's business. . . . The jury may have found that the driver in adopting the course he took under the foregoing circumstances, chose the quickest and best way to reach his destination, and that by so doing he had not abandoned

his master's business but was acting in the course of his employment."

Mathewson v. Edison Electric Illuminating Co., 232 Mass. 576, 581, and cases cited.
Hayes v. Wilkens, 194 Mass. 223, 226.
Lewandowski v. Cohen, 237 Mass. 125, 126.
Ritchie v. Walker, 63 Conn. 155, 161, 162.
Riley v. Standard Oil Co., 231 N. Y. 301, 305, 306.

A finding that Glogowski chose "the quickest and best way to reach his destination" was similarly warranted by the evidence of the declarations of Glogowski respecting his intention or state of mind in travelling on Route 126 at the time and place of the accident. These statements were, in substance, that he was going to New Jersey (R. 127), and that he took Route 126 to Route 20 towards Worcester because he could "open it up" on Route 20 (R. 93, 97, 98), that Route 20 was "much better, not as congested as the other route" (R. 97, 98) and he could "make better time." (R. 127.) His intention in this respect was material.

Mathewson v. Edison Elec. Ill. Co. of Boston, 232 Mass. 576, 580, 582.

Furthermore, even if the foregoing deviation was not fully warranted by the circumstance that Route 9 towards Worcester was much more congested and hilly than Route 126 and Route 20, such deviation of the driver from the more direct route of travel could be found by the jury to have been "slight" and "comparatively insignificant" when viewed in connection with the trip he was authorized to make to his ultimate destination all the way down to New Jersey.

In this respect it must be noted that Glogowski's deviation from Route 9 at the time of the accident was a mere one-half or one mile. That was the distance from the intersection of Route 126 and Route 9 to the scene of the

accident. (R. 47, 143.) The degree or extent of the servant's deviation is determined with reference to his actual deviation at the time and place of the collision, notwithstanding "any unexecuted intention [on his part] to deviate further from the [more] direct route," *Fitzgerald v. Boston & Northern Street Railway,* 214 Mass. 435, 439; *Pigeon's Case,* 216 Mass. 51, 54. The jury could indisputably find that a deviation of one-half or one mile was "slight" and "comparably insignificant."

However the same finding would be warranted if the extent of his deviation is considered with reference to the distance the jury could find he intended to travel before he rejoined Route 9, which deviation, it may be here assumed, the jury could have found to have been 13 miles. The source of Glogowski's authorized trip was Plainville. (R. 176, 179.) From there he travelled 27 miles to Draper's in the Town of Framingham (R. 235) and thence approximately 2 miles to the intersection of Route 126 with Route 9. (R. 45.) Route 9 from the latter point to its junction with Route 20 outside of Worcester was at least 15 miles. (R. 64.) It is a matter of common knowledge of which the court will take judicial notice that Framingham, Mass., is an outlying suburb of the City of Boston, *Town of Burlington v. Dunn,* 318 Mass. 216, 221, and that the distance from Boston to Trenton, New Jersey, exceeds 250 miles, at a very conservative estimate. 1947 World Almanac, p. 728 [Boston to Trenton, N. J., 296 miles; *Ibid* p. 727, Boston to New York, N. Y., 221 miles]; *Hoyt v. Russell,* 117 U. S. 401, 404, 405; *The Wahkeena,* 51 F. (2d) 106, 108, and cases cited. *In Re New Hampshire Development Co.,* 62 F. Supp. 726, 727. Under such circumstances Glogowski's intended deviation of (allegedly) 13 miles was not so disproportionate to the length of the trip he was authorized to make as to amount to an abandonment of his

employment terminating his master's responsibility for his negligence.

Fleischner v. Durgin, 207 Mass. 435, 436.
Lewandowski v. Cohen, 237 Mass. 125, 126.
Reynolds v. Denholm, 213 Mass. 576, 578.
Cummings v. Republic Truck Co., 241 Mass. 292, 294, 295.

Considering the long distance involved, considering that there was no time allotted Glogowski within which he was to make the trip, and having in mind that the truck when it left Draper's was heavily loaded with wool for delivery to New Jersey, the jury could properly find that Glogowski had not abandoned the performance of his duty and was acting *in the main* in furtherance of the business of his employer in transporting the wool to New Jersey.

Riley v. Standard Oil Co., 231 N. Y. 301, 304-306 (followed in *Cummings v. Republic Truck Co.,* 241 Mass. 292, 294, 295).
Ritchie v. Walker, 63 Conn. 155, 161, 162.
Sawyer's Case, 315 Mass. 75, 79.

There is no merit in the defendant corporation's further contention that at the time of the accident Glogowski was as a matter of law acting outside the scope of his employment or on an independent project of his own in taking on the sailor, Chasse, as a rider.

There was no evidence binding on the plaintiff that in picking up a rider Glogowski was acting in violation of any rule or instruction of the defendant corporation. The jury could discredit the testimony of the defendant Glogowski that he "was not allowed riders", (R. 180) even if such testimony was properly susceptible of the interpretation that there was a rule of the corporation prohibiting riders. See *Sawyer's Case,* 315 Mass. 75, 79, 80.

In any event since the jury could find that in travelling along Route 126 through Saxonville towards Route 20, Glogowski was travelling on a route which he could reasonably be expected by his employer to take in the performance of his duty in transporting the wool to New Jersey, the fact that at the time of the accident there was a rider on the truck who had been taken on contrary to a rule of the employer, could be found to be nothing more than a condition or attendant circumstance not in any way in derogation or attenuation of Glogowski's main or sole purpose to perform his above stated duty.

Cummings v. Republic Truck Co., 241 Mass. 292, 295.

Donahue v. Voremberg, 227 Mass. 1, 5, 6.

Mathewson v. Edison Electric Illuminating Co., 232 Mass. 576, 580, 581.

Sawyer's Case, 315 Mass. 75, 80.

The decision in *O'Leary v. Fash*, 245 Mass. 123, 125, cited by the defendant, is distinguishable. The difference in the liability of an employer to a passenger, who is allowed by an agent to ride on the employer's motor vehicle without the authority and consent of the employer, and the liability of an employer to a person who is run down in the street by an agent transporting a rider, is pointed out in that case and also in *Driscoll v. Scanlon*, 165 Mass. 348, 349.

What has been above stated disposes of the defendant corporation's suggestion that Glogowski pursued Route 126 beyond the Turnpike merely to transport the sailor to his home and for no other apparent purpose related to his employment. In this respect, however, there was evidence that the place where the sailor boarded the truck was beyond the Turnpike on the Saxonville side headed towards Saxonville (R. 136, 138, 140); that the rear of the truck

(which was 40 feet long) was at that time 100 feet beyond the northerly line of the Turnpike. (R. 141.) Moreover, the sailor was going home on an overnight pass; he didn't know Glogowski and had never seen him before. (R. 141.) When he got on the truck it started up promptly. "Glogowski asked him where he was going. The sailor said Saxonville. Glogowski proceeded." (R. 180.) There was no further talk as to where the rider was going (R. 142), and no talk with the driver relative to the sailor's address in Saxonville or as to how he would get from Route 126 to Danforth Street on which the sailor lived. (R. 166.) The foregoing testimony clearly substantiates the permissible finding of the jury that Glogowski, at the time he picked up the rider, was already on his way on Route 126 towards Saxonville in the performance of his duties, and repels the inference that he had abandoned such duties under all the circumstances for the mere accommodation of a person who was a complete stranger and whose address in Saxonville was unknown to him. (See Sawyer's Case, 315 Mass. 75, 79.)

Respecting the corporation's contention that Glogowski was acting outside the scope of his employment in that, at the time of the accident, he was violating the rate of speed limitations prescribed by the Office of Defense Transportation, it is sufficient to state that such a suggestion is a *reductio ad absurdum*". There was no evidence in the record that any speed limitations were imposed on Glogowski by the corporate defendant itself. It would follow from the proposed argument that any servant or agent who violated any provision of law relative to the operation of motor vehicles, would *ipso facto* abrogate his employer's liability for his negligent acts contrary to the well established rules of *respondeat superior*. Moreover, there is no

evidence in the record that the defendant corporation was a carrier in interstate commerce subject to the regulations of the Federal Office of Defense Transportation, and such a fact cannot be assumed.

II. The Declarations of Glogowski Were Admissible in Evidence.

The trial judge did not err in ruling that the subsequent declarations of Glogowski contained in his conversation with Davis could be taken into consideration by the jury as evidence of Glokowski's state of mind, purpose, or intention in travelling over Concord Street at the time of the accident as bearing on the question whether he was then engaged in the scope of his employment.

Glogowski's intention in this respect was material.

Mathewson v. Edison Electric Illuminating Co., 232 Mass. 576, 580, 582.

> "In determining questions [of evidence], a federal trial court has great latitude under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, which provides, in material part, that the statute or rule, federal or state, which favors the reception of proffered evidence shall govern its admissibility". *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797, 799. A federal court "must apply the more generous rule of evidence". *Worcester County Park Commission v. United States*, 143 F. (2d) 688, 694, 695.

Where the state of mind, purpose or intention of a person at a particular time, or in doing a particular act, is in issue, his declarations showing such intention, whether prior, contemporaneous or subsequent, are properly admissible if sufficiently near in point of time to afford a reasonable inference that such was his intention at the time in question. This is the firmly established rule in Massachusetts. *Pick-*

ens v. Davis, 134 Mass. 252, 257, 258. *Lane v. Moore,* 151 Mass. 87, 89, 90-92. *Aldrich v. Aldrich,* 215 Mass. 164, 170. *Commonwealth v. Trefethen,* 157 Mass. 180, 186, 190. *Shailer v. Bumstead,* 99 Mass. 112, 122, 123. *Crosby v. Mutual Life Ins. Co.,* 221 Mass. 461, 463, 464. *Commonwealth v. Damon,* 136 Mass. 441, 448, 449. *Hagar v. Norton,* 188 Mass. 47, 52. *Brady v. Doherty,* 253 Mass. 518, 522. *Mahan v. Perkins,* 274 Mass. 176, 179. *Malone v. Walsh,* 315 Mass. 484, 490. Wigmore, Evidence (3rd Ed.), Vol. VI, #1729, p. 91, #1714, p. 60, #1726 (2), pp. 87, 88; Vol. II, ##233, 241, 242(3).

Such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time, then the subsequent testimony of the same persons.

Elmer v. Fessendon, 151 Mass. 359, 362.
Starkie, Evidence, (10th Am. Ed.) 89.
Wigmore, Evidence, (3rd Ed.) #1714, Vol. VI, p. 60.

In accordance with the foregoing cases the declarations of Glogowski relative to why he was travelling on Concord Street on Route 126 at the time of the accident, and relative to why, in his experiences as a truck driver, he ordinarily travelled on such route on his way towards Worcester, were equally admissible in evidence as indicating his probable state of mind, purpose or intention in taking such route at the time of the accident. Cases cited *ante.* Also: *Partridge v. United Elastic Corp.,* 288 Mass. 138, 141. *Inness v. Boston Revere Beach & Lynn R. R. Co.,* 168 Mass. 433, 434, 435. *Comm. v. Ramey,* 243 Mass. 394, 397, *Comm. v. Rubin,* 318 Mass. 587, 588, 589.

Whether such declarations were sufficiently near in point of time to have some natural bearing upon his state of

mind or intention at the time of the accident was a preliminary question of fact largely within the discretion of the trial judge. His determination of this preliminary question must be accepted as conclusive on the circumstances of the instant case, such declarations being made only three to ten days after the accident.

Lane v. Moore, 151 Mass. 87, 91.
Comm. v. Trefethen, 157 Mass. 180, 183, 184.
McCoy v. Jordan, 184 Mass. 575, 576, 577.
Howes v. Colburn, 165 Mass. 385, 387.

The declarations were admissible against the corporate defendant. They indicated the servant's intention or state of mind in travelling over Route 126 at the time of the accident, which intention or state of mind was a fact relevant to the fact in issue, whether he was at such time engaged in the course of his employment by the corporate defendant. They were not direct evidence of the external fact that he was so engaged, but merely circumstantial or evidential, to be considered in connection with all the other circumstances in the case bearing upon the question. As such, the declarations evidencing his intention constitute an exception to the hearsay rule, are admissible in evidence though not technically forming part of the *res gestae,* and are not subject to the rule that declarations by an agent in the nature of direct admissions of liability are not binding on the principal in the absence of independent evidence of the authority of the alleged agent to make them. *Lane v. Moore,* 151 Mass. 87, 90, 91. *Pickens v. Davis,* 134 Mass. 252, 257, 258. *Comm. v. Trefethen,* 157 Mass. 180, 185, 186, 188. *Aldrich v. Aldrich,* 215 Mass. 164, 170. *Inness v. Boston, Revere Beach & Lynn R. R. Co.,* 168 Mass. 433, 434, 435. *Pickens v. Davis,* 134 Mass. 252, 257, 258. *Potter v. Baldwin,* 133 Mass. 427, 428, 429. *State v. Journey,* 115 Conn. 344, 351, and cases cited. *In Re Coleman,* 53 Idaho

339, 343, 344. Wigmore, Evidence (3rd Ed.) Vol. VI, #1715, p. 62; #1726, pp. 87, 88.

See Restatement, Agency, #289, Comment C.

> "*Statements of state of mind.* Evidence of statements by an agent introduced in order to show the purpose for which he did an act or to show his knowledge or state of mind is admissible in favor of and *against the principal* (italics ours) under the rules relating to the introduction of evidence for this purpose. Statements by an agent are not excluded because made by an agent. If his knowledge or state of mind or purpose is relevant to the cause of action which is being brought, either party may introduce evidence relevant to show this."

The same rule obtains in the federal courts respecting the admissibility of declarations evidencing state of mind, purpose or intention at a particular time or in doing a particular act. *Lawlor v. Loewe,* 235 U. S. 522, 536. "Such statements, though hearsay, are admissible to prove the state of mind of the declarant if that be in issue." *Greater New York C. of C. v. U. S.,* 47 F. (2d) 156, 159. "Such evidence is an exception to the hearsay rule, and is well recognized." *American Cooperative Serum Ass'n v. Anchor Serum Co.,* 153 F. (2d) 907, 912 (1946) and cases and authorities cited. "It is well established that the state of a person's mind on a certain date may be proved by his subsequent statements and declarations." *U. S. v. Schuchhardt,* 49 F. Supp. 567, 568 (1943) and cases cited. *U. S. v. Jogwick,* 51 F. Supp. 2, 3. *Glaser v. United States,* 289 F. 255, 256, cert. denied, 263 U. S. 700. *U. S. v. Schlotfeldt,* 136 F. (2d) 935, 938. See *Buckeye Powder Co. v. DuPont Powder Co.,* 248 U. S. 55, 65. See also: *Tobin v. Walkin Shaw,* 23 F. C. 1346, 1347, 1348, (C. C.), Fed. Cas. No. 14,070. *Hawes v. Victoria Mining Co.,* 160 U. S. 303, 318. *Arab Corporation v. Bruce,* 142 F. (2d) 604, 608, note 9. *National Labor Relations Board v. Southern Wood Pre-*

serving Co., 135 F. (2d) 606, 607. *Chicago and N. W. Ry. Co. v. McKenna*, 74 F. (2d) 155, 157. *Kerr v. Modern Woodmen of America*, 117 F. 593, 595. *U. S. v. Gentry*, 119 F. 70, 73. *U. S. v. Wells*, 283 U. S. 102, 113. *Bankers Trust Co. v. Higgins*, 65 F. Supp. 836, 839. *Wright v. Bragg*, 106 F. 25.

The substance of Glogowski's remarks was that he took Route 126 to Route 20 "over there" to Worcester and New Jersey because the latter route was not as congested as Route 9 and that in his opinion he could make better time on Route 126 and Route 20. Such evidence was admissible to show Glogowski's belief, state of mind, motive or intention in following one route rather than the other. It is true, as argued by the petitioners, that such declarations were not admissible to prove the truth of the facts recited therein, viz. that Route 20 was in fact less congested than Route 9 and that better time could in fact be made on Route 20 than on Route 9. Lane v. Moore, 151 Mass. 87, 90. But since the petitioners did not ask for an instruction limiting the probative force of the evidence to the issue of state of mind, but attempted rather to exclude the evidence entirely, they cannot now claim error in its admission. *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 F. (2d) 156, 159 (C. C. A. 2) and cases and authorities cited. *Elmer v. Fessenden*, 151 Mass. 359, 361. *Hubbard v. Allyn*, 200 Mass. 166, 171. *Weston v. Barnicoat*, 175 Mass. 454, 456. *Palmer v. Hoffman*, 318 U. S. 109, 119 and cases cited. *Eastman v. U. S.*, 153 F. (2d) 80, 84; cert. denied 66 S. Ct. 1342. Rule 51 (F. R. C. P.). *Salonen v. Paanenem*, 1947 Mass. Ad. Sh. 29, 36.

Sylvester v. New York, New Haven & Hartford R. R., 217 Mass. 148, 152, *Jackson v. Colonial Provision Co., Inc.*, 314 Mass. 177, 179, 180, and *Du Bois v. Powdrell*, 271 Mass.

394, 397, cited by the defendant as authority for the proposition that an agent may not by his own declaration show the nature and extent of his authority, are inapplicable here. The declarations in the instant case were not declarations of the latter character; nor was the nature and extent of Glogowski's authority a question in dispute. See *Nowell v. Chipman,* 170 Mass. 340, 343, 344.

Conklin v. Consolidated Railway, 196 Mass. 302, is also distinguishable from the instant case. The state of mind or intention of the agent in that case was not an issue or a fact relevant to a fact in issue. The fact in issue was whether the agent assaulted the plaintiff. The intention or state of mind of the agent at the time of the assault, or the intention or state of mind with which he committed the assault, was entirely irrelevant and immaterial on the issues involved. *Lane v. Moore,* 151 Mass. 87, 90. *Pickens v. Davis,* 134 Mass. 252, 257, 258. As pointed out in *Bonino v. Caledonio,* 144 Mass. 299, 302 (which case is stated in the *Conklin case,* p. 307, to be exactly the converse of the situation presented in the *Conklin case)* "no substantive question of intention was involved in the proof that the defendant first assaulted the plaintiff, which would make evidence of a (prior intention) competent in proof of that fact". See also for adverse comment on the *Conklin case,* Wigmore, Evidence (3rd Ed.) #106, note 1 (cited in the opinion of the Circuit Court).

III. The Admission of Such Evidence, Even if Technically Erroneous, Did Not Constitute Harmful Error.

A. *The Corporate Defendant Waived its Objections to the Competency of the Evidence.*

Assuming that there may have been any technical error of law in the judge's ruling in his charge to the jury respecting the testimony of the conversation had between Glogow-

ski and Davis, any such assumed error cannot be availed of by the corporate defendant as a ground for reversal or the granting of a new trial. The objections taken by counsel for the defendants to the admission of such testimony in direct examination of the plaintiff and the witness Davis cannot be sustained as a ground for exception to the charge, even if erroneous, for the reason that without objection or exception both witnesses later testified to identically and substantially the same conversation,—and more—, on cross-examination by counsel for the defendants. It has been repeatedly held in Massachusetts and in the Federal Courts that, where identical or similar testimony is brought out in cross-examination without objection or exception, or reservation thereof, the objection made in chief is waived and abandoned and the testimony becomes competent evidence entitled to its full probative value on all issues in the case to which it is applicable, as if no prior objection lay to its admission. *DiAngelo v. United Markets, Inc.*, 319 Mass. 143, 145. *Commonwealth v. Parrotta*, 316 Mass. 307, 312, 313. *Commonwealth v. Capalbo*, 308 Mass. 376, 382. *Bendett v. Bendett*, 315 Mass. 59, 65, 66. *Commonwealth v. Mannos*, 311 Mass. 94, 114, 115. *Ryder v. Board of Health of Lexington*, 273 Mass. 177, 179, 180. *Morrison v. Lawrence*, 186 Mass. 456, 458. *Perivoliotis v. Eveleth*, 251 Mass. 444, 446, 447. *Mathewson v. Edison Electric Illuminating Co.*, 232 Mass. 576, 582. *Noyes v. Gagnon*, 225 Mass. 580, 588. Mass. G. L. (Ter. Ed.) C. 231, #132. *Trouser Corporation v. Goodman & Theise*, 153 F. (2d) 284, 287, 288. *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797, 799, 800. *United States v. Fried*, 149 F. (2d) 1011, 1013, *Westchester County Park Commission v. United States*, 143 F. (2d) 688, 694, 695; cert. denied, 323 U. S. 726. *Milwaukee Mechanics Ins. Co. v. Oliver*, 139 F. (2d) 405, 407. *Snipes v. Augusta-Aiken Ry. & Elec. Co.*, 151 S. C. 391, 396.

For examples:

In *DiAngelo v. United Markets, Inc.*, 319 Mass. 143, at 145, the court stated, in disposing of an exception taken by the defendant to certain testimony elicited in direct examination of the plaintiff:

> "This exception cannot be sustained because without objection she [plaintiff] later testified in identical language on cross-examination."
>
> *Commonwealth v. Parrotta*, 316 Mass. 307, 312 (same effect).

In *Trouser Corporation v. Goodman & Theise*, 153 F. (2d) 284, 287, 288 (C. C. A.), in which certain statements made by an agent were held to be erroneously admitted in evidence as against his employer over the objection of the defendant in direct examination of the witness, the court said, pp. 287, 288:

> "But the defendant waived this objection. In cross-examination of the [same] witness—the defendant asked for the [same] statement. Objection to competency is lost if the objecting party himself offers the same testimony as evidence."

In *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797, 799, 800 (C. C. A.), the court held that admission of testimony in direct examination of the plaintiff over objection of counsel for the defendant, even if erroneous, did not affect the substantial rights of the parties under Rule 61 of the Federal Rules of Civil Procedure (28 U. S. C. A. ff. #723c) or Sec. 269 of the Judicial Code, as amended (28 U. S. C. A. #391), for the reason that:

> "The record discloses that on cross-examination of the plaintiff, appellant's counsel elicited substantially the same evidence, concerning the conversation to

> which the plaintiff had previously testified in direct examination over the objection of the [appellant]. . . . In these circumstances, . . . whatever error may have been committed in admitting evidence in the first instance, the error became harmless in the sense that it became unavailing to the appellant as a ground for reversal."

In the instant case although the testimony in question had been previously objected to by counsel for the defendants, it was subsequently voluntarily adduced in behalf of the defendants without objection or exception, or reservation thereof, on cross-examination of the same witnesses. On cross-examination of the plaintiff relative thereto, counsel for the defendants examined the witness fully and exhaustively respecting the same conversation, asked the witness to state the entire conversation, to repeat and reiterate it in every detail;—whereupon the plaintiff testified to the *identical conversation elicited on direct examination; also to further statements made by Glogowski at the time with respect to the latter's purpose or motive in taking Concord Street (Route 126) to Route 20,* in preference to Route 9; and *also to further statements made by Glogowski at the time bearing on the question of negligence of both the corporate and the individual defendant in the maintenance and operation of the motor truck at the time of the accident,* which further statements constituted *original evidence* not theretofore introduced by the plaintiff. Substantially the same procedure was followed by counsel for the defendants in cross-examination of the witness Davis relative to the same conversation.

Under such circumstances counsel for the defendants waived and abandoned his prior objection to the admission of the evidence in question. So far as the record goes, the testimony on the same subject matter adduced on cross-

examination of the witnesses without objection or exception, or reservation thereof, as well as the testimony of additional statements made by Glogowski bearing on the issue or negligence, remained evidence in the case as against both the corporate and the individual defendant. Such evidence was entitled to its full probative value or force as evidence of the fact that the defendant Glogowski was driving the truck in the scope of his employment by the corporate defendant and in pursuance of its business interests, irrespective of whether such testimony was technically incompetent as against the corporate defendant to establish the latter fact. *Ventromile v. Malden Electric Co.*, 317 Mass. 132, 135. *DuBois v. Powdrell*, 271 Mass. 394, 397. *Douglas v. Holyoke Machine Co.*, 233 Mass. 573, 575. *Diaz v. U. S.*, 223 U. S. 442, 450. *Jackson v. Colonial Provision Co.*, 314 Mass. 177, 180. Incompetent evidence which has been admitted without objection "remains evidence in the case", *Rapson v. Leighton*, 187 Mass. 432, 435; *Comm. v. Mannos*, 311 Mass. 94, 115; *Comm. v. Capalbo*, 308 Mass. 376, 382, 383, "is entitled to its natural and full probative force on all issues in the case to which it may be applicable". *Ventromile v. Malden Electric Co.*, 317 Mass. 132, 135; *Pochi v. Brett*, 319 Mass. 197, 203; *Comeau v. Beck*, 319 Mass. 17, 19; *Stearns v. Warren*, 284 Mass. 268, 275; *Spiller v. Atchison, Topeka & Sante Fe*, 253 U. S. 117, 130, and "may be weighed with other evidence and given any evidentiary value which it may possess". *Mahoney v. Harley Private Hospital*, 279 Mass. 96, 100. *Ryan v. DiPaolo*, 313 Mass. 492, 494.

Consequently, the case falls within the rule that "the admission or exclusion of merely cumulative evidence that adds nothing to evidence already in the case, does not require the sustaining of exceptions, even though there was

technical error." *Bendett v. Bendett,* 315 Mass. 59, 65, 66. *Abele v. Dietz,* 312 Mass. 685, 690, 691. *Comm. v. Mannos,* 311 Mass. 94, 114, 115. *Perivoliotis v. Eveleth,* 251 Mass. 444, 446, 447.

> "The original ruling of the trial judge [in direct examination of the plaintiff and Davis limiting the evidence of the conversation as against the defendant Glogowski merely] had not become the law of the trial—and did not preclude the admission of other evidence of the conversation even on cross-examination of the same witnesses." *Comm. v. Parrotta,* 316 Mass. 307, 312. *DiAngelo v. United Markets, Inc.,* 319 Mass. 143, 145. *Ryder v. Board of Health of Lexington,* 273 Mass. 177, 179, 180.

In the latter connection it is to be noted that, although the judge had previously ruled on direct examination of the plaintiff that the evidence of the statements made by Glogowski did not bind the corporate defendant, (R. 93) the judge modified or qualified this ruling immediately after the statements, previously objected to, were elicited on cross-examination of the plaintiff without objection or exception or application for restriction of their use. At the latter point in the trial the judge stated to the jury that he would make an additional ruling later on with respect to the probative force that such conversation would have with respect to the issues involved in the case. (R. 99.) Nor did the trial judge make any ruling with respect to the evidence of the conversation in question when culled in cross-examination of the witness Davis. Since at such stage of the trial, the prior objections to the conversation were waived and abandoned by counsel for the defendants, due to his cross-examination covering the same subject matter, and since at such time the evidence was entitled to its full probative value against the corporation both on the issue whether Glogowski was acting within the

scope of his employment, and on the issue of negligence, the corporate defendant cannot be heard to complain of the judge's charge to the jury, in which he instructed them, that the evidence was competent to show Glogowski's state of mind or intention as bearing on the issue of whether he was acting within the scope of his employment. Under the circumstances the instruction was more than favorable to the corporate defendant who had lost his right to object to the evidence of the conversation on all issues in the case, and it cannot be heard to complain of the ruling sufficiently favorable to it.

In brief, the exception to the charge in the above respect taken by counsel for the defendants was of no avail to the corporate defendant. Its objection to the competency of the evidence was waived and lost. The evidence brought out on cross-examination was entitled to its full probative force at the time of the defendant's exception to the charge. It was too late then to save an exception respecting competency. *Ryder v. Board of Health of Lexington,* 273 Mass. 177, 179. *Cummings v. National Shawmut Bank,* 284 Mass. 563, 568. *Orpin v. Morrison,* 230 Mass. 529, 532. *Randall v. Peerless Motor Car Co.,* 212 Mass. 352, 384. *Comm. v. Johnson,* 199 Mass. 55.

The corporate defendant contends that the foregoing rule relative to waiver of a prior objection by cross-examination eliciting the same subject matter, is inapplicable as against the corporate defendant on the circumstances of this case. It is argued that the same attorney acted as counsel for Glogowski and the corporate defendant; that since at the time of the cross-examination of the witnesses relative to the declarations in question there was in effect a prior ruling by the trial judge limiting the evidence of such declarations solely as against the defendant Glogow-

ski, there was no occasion for cross-examination in behalf of the corporate defendant, and it must be assumed that in cross-examining the witnesses counsel was acting for and in behalf of the individual defendant Glogowski alone. But we have seen that the original ruling by the trial judge had not become the law of the case *Janback v. Aamunkoitto Temp. Soc.*, 273 Mass. 45, 50. *Comm. v. Parrotta*, 316 Mass. 307, 312, and did not preclude the doctrine of waiver by cross-examination eliciting the same subject matter. *Comm. v. Parrotta*, 316 Mass. 307, 312. *Di Angelo v. United Markets, Inc.*, 319 Mass. 143, 145.

And quite contrary to the above suggestion of the corporate defendant, it must be assumed that the cross-examination relative to the remarks of Glogowski was being conducted in behalf of the corporate defendant alone since the state of mind or intention of Glogowski *was entirely immaterial and irrelevant in the case against Glogowski.* Or, at best, it must be assumed that the attorney who was representing both defendants during the trial of the case, *was representing both defendants at all stages thereof,*— including the occasion of his cross examination of witnesses relative to the remarks of Glogowski—, unless and until it was specifically brought to the attention of the court that he was acting solely in the interest of one of the defendants. The question whether counsel was representing one or both of the defendants cannot be determined by considering the advisability or sagacity of his representing one or both of the defendants. Nor can it be determined by the undisclosed intention of counsel. It is a fundamental and well established rule that when there are two or more parties, or two or more cases are tried together, evidence offered is admissible as against all parties unless application is made for restriction of its use as against designated par-

ties. *Solomon v. Dabrowski,* 295 Mass. 358, 359, 360. *Comm. v. Shephard,* 313 Mass. 590, 598. *Palmer v. Hoffman,* 318 Mass. 109, 119 and cases cited. *Eastman v. U. S.,* 153 F(2d) 80, 84, cert. denied, 66 S. Ct. 1342. *U. S. v. Daily,* 139 F(2d) 7, 9. Rule 51 (F. R. C. P.) 28 U. S. C. A., ff. #723c. The latter rule is applicable here. If the corporate defendant wished to obviate a waiver by it of its prior objections under the doctrine of the *Di Angelo* and *Parotta* cases, it was incumbent upon counsel acting for both defendants to ask for a limitation or restriction to the individual defendant alone of the evidence elicited in cross-examination.

B. The Exception to the Charge Was Not Validly Taken.

Moreover the exception to the charge in itself, even if it was not too late, was a general one without any application made for restriction of the evidence. The declarations made by Glogowski contained statements in the nature of admissions, and otherwise, which were binding on Glogowski on the issue of negligence. Such statements were admissible in the count against him, even assuming that they may have been incompetent to bind the corporate defendant. Where several cases are tried together and evidence is offered which is competent as to one or more parties and not competent as to others, a general exception to the charge based on the admission of such evidence cannot prevail. The excepting party must call the attention of the trial judge to any limitations which he believes should be imposed upon the application of the evidence as to issues and parties in order to save a valid exception. *Potter v. Baldwin,* 133 Mass. 427, 428, 429. *Solomon v. Dabrowski,* 295 Mass. 358, 359, 360. *Comm. v. Shephard,* 313 Mass. 590, 598. *Salonen v. Paanenen,* 1947 Mass. Ad. Sh. 29, 36.

Palmer v. Hoffman, 318 U. S. 109, 119 and cases cited. *Eastman v. U. S.,* 153 F (2d) 80, 84; cert. denied 66 S. Ct. 1342. *U. S. v. Daily,* 139 F (2d) 7, 9. Rule 51 of the Federal Rules of Civil Procedure (28 U. S. C. A., ff. #723c). This the corporate defendant failed to do.

C. & D. The Evidence In Question Was Merely Cumulative.

The admission of the evidence of the declarations of Glogowski, even if erroneous, and assuming that such error was not cured by the same evidence being elicited on cross-examination by counsel for the defendants, did not injuriously affect the substantial rights of the corporate defendant on another ground.

The remarks of Glogowski were material only insofar as they tended to establish Glogowski's state of mind or intention in his traveling out of Framingham on Route 126 to Route 20, rather than on Route 9. His choice of one Route in preference to the other was, in turn, significant merely because of the corporate defendant's contention that he had deviated from the route specifically assigned to him by his employer, which was allegedly Route 9. However, as previously pointed out, whether Glogowski was given express instruction to pursue Route 9 out of Framingham was a question for the jury on contradictory evidence, and the jury could find that no such instruction was given him. The jury could find on abundant evidence that at the time of the accident Glogowski was travelling with his truck and trailer loaded with wool on a route out of Framingham (126) which he reasonably could have been expected to take by his employer,—a route which led directly to Route 20, which was described in the evidence as a "through way", "a common highway for travel",

and "a main route used for transportation into New York and New Jersey". *Such permissible findings of the jury rendered entirely inconsequential the question why or wherefore Glogowski did not take Route 9, rather than Route 126 to Route 20, out of Framingham.* Under such circumstances reception of the testimony of the remarks of Glogowski was entirely harmless and unprejudicial to the corporate defendant.

Furthermore, the declarations of Glogowski bearing on the question of his intent or state of mind in travelling over Concord Street at the time of the accident were in substance to the effect that he took Route 126 to Route 20 "over there" to Worcester because the latter route was not as congested as the other route (the Turnpike) and that he could make better time on Route 126 and Route 20 to Worcester. Such evidence of his state of mind or intention was merely cumulative of other ample and abundant evidence in the record (relative to the comparison, with respect to the volume and character of traffic and volume and character of hills, between the two means of travel to the intersection of Routes 9 and 20 outside of Worcester) *from which the jury could properly find or infer the identical or substantially identical fact that Glogowski's purpose in travelling on the route he was on was to make better time and avoid the congestion in traffic on Route 9.* For this added reason, the judge's charge to the jury relative to the declarations of Glogowski, even if technically erroneous, could work no injury to the corporate defendant. *Inness v. Boston, Revere Beach and Lynn R. R. Co.,* 168 Mass. 433, 435. *Duggan v. Bay State Street Railway,* 230 Mass. 370, 383. *Coneton v. Old Colony Street Railway,* 212 Mass. 28, 29. *Comerford v. N. Y., N. H. & H. R. R. Co.,* 181 Mass. 528, 530. *Mathewson v. Edison*

Electric Illuminating Co., 232 Mass. 576, 581, 582. "The admission or exclusion of merely cumulative evidence that adds nothing to evidence already in the case does not require the sustaining of exceptions, even though there was technical error". *Bendett v. Bendett*, 315 Mass. 59, 65, 66, and cases cited. *Abele v. Dietz*, 312 Mass. 685, 690, 691, and cases cited. "It is clearly established that error in receiving proof of a declaration is harmless where the fact sought to be proved is established by other evidence." *Standard Oil Co. of New Jersey v. Neville*, 48 F (2d) 580, 581.

Conclusion.

Wherefore, since the petitioner Garford Trucking Corporation has failed to sustain the burden of showing error in the judgment which is asked to be reviewed and set aside, *Higgins v. Cain Bros. Co.*, 317 U. S. 572, 574. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570, the respondent respectfully prays this Honorable Court that this petition for a writ of certiorari be denied.

By his Attorneys,

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